24634

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 195

THE WESTERN & ATLANTIC RAILROAD, APPELLANT,

vs.

THE RAILROAD COMMISSION OF GEORGIA, C. M. CANDLER, PAUL B. TRAMMELL, JOHN A. PERRY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 13, 1921.

(26,541)

(28,541)

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OCTOBER TERM, 1921.

No. 586.

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1 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

THE WESTERN & ATLANTIC RAILROAD, Complainant,

versus

THE RAILROAD COMMISSION OF GEORGIA, C. M. CANDLER, PAUL B. Trammell, James A. Perry, John T. Boifeuillet, and James D. Price, as Individuals and also as Members Constututing the Railroad Commission of Georgia; Albert Collier, Individually and as Secretary of the Railroad Commission of Georgia; James K. Hines, Individually and as Special Attorney to the Railroad Commission of Georgia, and George M. Napier, Individually and as Attorney General of the State of Georgia, Respondents.

To the Honorable the Judges of the United States District Court for the Northern District of Georgia, Sitting in Equity:

The complainant brings this its bill of complaint against the respondents above named and respectfully shows to the Court as follows:

I.

That the complainant, the Western & Atlantic Railroad is a Georgia corporation.

That The Nashville, Chattanooga & St. Louis Railway is a Tennessee corporation with its principal office at Nashville, Davidson County, Tennessee; that said The Nashville, Chattanooga & St. Louis Railway, conformably to the laws of the State of Georgia (Act of November 30th, 1915, as amended by the Acts of August 4th and 19th, 1916), leased from the State of Georgia the Western & Atlantic Railroad for a period of fifty years commencing December 27, 1919, said contract being dated May 11, 1917. By virtue of the provisions of Section 11 of said act of November 30, 1915, commonly called the "Lease Act," The Nashville, Chattanooga & St. Louis Railway, by virture of said lease, became a Georgia corporation under the
2 name and style of the Western & Atlantic Railroad, said Section 11, for the convenience of the Court, is hereto attached, marked Exhibit No. 1, but not for copy.

II.

That the Respondent Railroad Commission of the State of Georgia was created and empowered by various acts of the Legislature of said State brought forward and codified in the 1910 Code of Georgia as Sections 2615 to 2670, inclusive; the domicile of said Commission as fixed by Section 2625 of said Code being in the City of Atlanta,

Fulton County, in the Northern District of Georgia. The respondents C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, constitute the personnel of the Railroad Commission of the State of Georgia, having been duly elected and qualified according to law, and are citizens, residents and inhabitants of the Northern District of the State of Georgia, except that John T. Boifeuillet is a resident and inhabitant of the Southern District of the State of Georgia.

Respondent Albert Collier is the duly qualified Secretary of the Railroad Commission of the State of Georgia, and a citizen, resident and inhabitant of the Northern District of Georgia.

Respondent James K. Hines is the Special Attorney to the Railroad Commission of Georgia, appointed under Section 2624 of said Georgia Code, and is a citizen, resident and inhabitant of the Northern District of the State of Georgia.

Respondent George M. Napier is Attorney General for the State of Georgia, his duties being set forth in Sections 254 to 257, inclusive, and Sections 2648 of said Georgia Code, and is a citizen, resident and inhabitant of the Northern District of Georgia.

III.

This suit, together with the controversies upon which it is based, is of a civil nature and arises under the Constitution (Fourteenth Amendment) and laws (Interstate Commerce Act) of the United States, and attacks the constitutionality and legality of an order of the Railroad Commission of the State of Georgia, as well as the state statute on which based, requiring complainant to construct
3 and maintain at complainant's sole expense a private siding for the Farmers Warehouse Company at Smyrna, Georgia, existing physical facilities furnished by complainant being entirely adequate to properly handle all business at Smyrna, the total business of said Farmers Warehouse Company, inbound and outbound, yielding your complaint- a gross revenue (on an average) of less than $90.00 per month, all other shippers and industries similarly situated being compelled to bear a fair part of the construction and maintenance cost of private sidings in accordance with a fixed, fair general policy of your complainant.

IV.

In this suit the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

V.

Complainant Western & Atlantic Railroad is a Georgia corporation operating a line of railroad, doing both inter and intrastate business between the City of Chattanooga in Tennessee and the City of Atlanta in the State of Georgia, a distance of 137 miles, and forms an integral part of the system of The Nashville, Chattanooga & St.

Louis Railway, which operates approximately 1,250 miles of main line track in the States of Tennessee, Kentucky, Alabama and Georgia.

VI.

The Farmers' Warehouse Company, a Georgia corporation, with its principal office at Smyrna, Georgia, a station on the line of the Western & Atlantic Railroad fifteen miles from the City of Atlanta, filed on the 15th day of March, 1921, a petition with the Railroad Commission of the State of Georgia to compel the Western & Atlantic Railroad to construct a spur or industrial track for its use, whereupon, after a hearing, the Railroad Commission of the State of Georgia issued the following order, under date of April 29, 1921:

"In re Application of FARMERS WAREHOUSE COMPANY, INC., for Order Directing the Western & Atlantic Railroad to Construct and Render Service Over a Spur Track to Applicant's Warehouse at Smyrna, Ga.

"Upon consideration of the record in the above stated application, the spur track as prayed for appearing to be practicable and the business to be done thereon sufficient to justify the construction thereof and service thereover under the terms and conditions hereto attached, it is

"Ordered: That the Western & Atlantic Railroad do construct and place in service within 90 days from this date a spur or industrial track to the Farmers Warehouse Company's warehouse abutting the right of way of said Railroad at Smyrna, of the length and location as shown and described in the record and exhibits thereto, upon the terms and conditions proviced in General Order No. 15 of the Director General of Railroads during the period of the United States Railroad Administration, to which terms and conditions applicant has agreed and accordingly constructed its said warehouse.

By order of the Railroad Commission of Georgia:

(S.) C. M. CANDLER,
Chairman."

(S.) ALBERT COLLIER,
Secretary. [SEAL.]

About July 1, 1921 the Western & Atlantic Railroad filed a petition asking for a construction of said order of April 29, 1921, and on July 14, 1921, the Railroad Commission issued the following final order in this proceeding:

"Referring further to the question of construction of spur track at Smyrna, Ga. for the Farmers Warehouse Company, and to petition of the Western & Atlantic Railroad for proper interpretation of order issued by this Commission under date of April 29th, 1921.

"Upon consideration of this matter by the Commission, I am directed to advise you that the Commission construes its order of

April 29, 1921, as intending that the Western & Atlantic Railroad bear the entire cost of the construction of this industrial spur track, the same to be located on the right of way of the Western & Atlantic Railroad, and in view of the petition of the Western & Atlantic Railroad asking for proper interpretation of the order above referred to, the time limit within which this spur track is to be completed is hereby extended 60 days from this date.

(S.) ALBERT COLLIER,
Secretary."

A full, complete and accurate transcript of all these proceedings before the Railroad Commission of the State of Georgia, duly certified to by its Secretary, is hereto attached, marked Exhibit No. 2, but not for copy.

VII.

The respondent Railroad Commission of the State of Georgia is, by Section 2664 of the 1910 Georgia Code, vested with the following powers:

"2664. Further powers. The railroad commission shall have authority to ascertain the cost of construction and the present value of properties in Georgia owned by said corporations or companies, and to that end may employ necessary experts. Said commission shall have authority to prescribe rules with reference to spur-tracks and sidetracks, with reference to their use and construction, removal or change, with full power to compel service to be furnished to manufacturing plants, warehouses, and similar places of business along the line of railroads, where practicable and in the judgment of the commission the business is sufficient to justify, and on such terms and conditions as the commission may prescribe. It shall have power and authority when in its judgment practicable and to the interest of the public, to order and compel the making and operation of physical connection between lines of railroad crossing or intersecting each other, or entering the same incorporated town, or city in this State. It shall have authority to fix penalties for neglect on the part of railroad companies to adjust overcharges and losses, or failure to decline to do so, if deemed unjust, in a reasonable time. It shall have power and authority to prescribe rules and penalties covering and requiring the prompt receipt, carriage, and delivery of freight, the prompt furnishing of cars to shippers desiring to ship freight, and shall also be authorized to prescribe rules and penalties for the transfer of cars through yards of connecting roads. Said commission shall have power and authority to order the erection of depots and appointment and service thereat of depot or station agents. The commission shall also have the power and authority to regulate schedules and compel connections at junction points of competing lines."

Penalties for the violation of any legal order of said Commission are provided for in Sections 2667, 2668 and 2669 of the 1910 Georgia Code, which are as follows:

"2667. Penalties; proceedings to recover. Every common carrier, railroad, street-railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, and terminal company or corporation within the State and other corporations, companies, or persons coming under the provisions of this section, and all officers, agents and employes of the same, shall obey, observe and comply with every order made by the commission under authority of law. Any common carrier, railroad, street-railroad, railroad corporation, street-railroad corporation, express, telephone, telegraph, dock, wharfage, or terminal company or corporation, cotton-compress company within this State, and other corporations, companies or persons coming under the provisions of this section, which shall violate any provision of this section or the acts heretofore passed, or which fails, omits, or neglects to obey, observe and comply with any order, direction or requirements of the commission heretofore or hereafter passed, shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section, or any preceding act, or of any such order, direction, or requirement of the railroad commission shall be a separate and distinct offense, and, in case of continued violation, every day a violation thereto takes place shall be deemed a separate and distinct offense. An action for the recovery of such penalty may be brought in the county of the principal office of such corporation or company in this State, or in the county of the State where such violation has occurred and wrong shall be perpetrated, or in any county in this State through which said corporation or company operates, or where the violation consists of an excessive charge for the carriage of freight or passengers, or service rendered, in any county in whch said charges are made, or through which it was intended that such passengers or freight should have been carried or through which such corporation operates, and shall be brought in the name of the State of Georgia by direction of the Governor. Any procedure to enforce such penalty shall be triable at the first term of the court at which it is brought and shall be given precedence over other business by the presiding judge, and the court shall not be adjourned until such proceeding is legally continued or disposed of. The decision in such case may be taken to the Supreme Court as now provided in cases of the grant or refusal of injunctions by judges of the superior courts."

"2668. Penalties for aiding and abetting in violations of rules. Every officer, agent, or employe of any such common carrier, corporation, or company who shall violate, or procures, aids, or abets any violation by any such common carrier or corporation or company, of any provision of this Section, or which shall fail to obey, observe, or comply with any order of the commission or any provision of any order of the commission, or who procures, aids, or abets any such common carrier or corporation or company in its failure to obey, observe, and comply with any such order, direction, or provision shall be guilty of a misdemeanor, and shall be subject to prosecution in any county in Georgia in which said common car-

rier or corporation or company or officer or agent, or employe violates the provisions of this Section or any provision of any order of the commission, or in any county through which said corporation operates. Any officer, agent, or employee shall also be subject to indictment under the provisions of this Section, in any county in which a subordinate agent or employe of the company violates the provisions of this Section, by the approval or direction, or in consequence of the approval or direction of such officer, agent, or employe; and the agent or employe who locally in any county violates the rules or directions of said commission in pursuance
6 of the direction or authority of his superior officer or agent of said company may be called as a witness, and he compelled to testify, showing the authority by which he acted, and such testimony shall not be used against such subordinate employe or agent, nor shall he thereafter be subject to indictment for said offense."

"2669. Penalties applicable to all orders of the commission. The penalties prescribed by this Section and the procedure to enforce the same are made applicable to any and all violations of the rules, orders and regulations established by the commission."

The Western & Atlantic Railroad submitted to the Farmers Warehouse Company its standard side or industrial track contract with the blanks filled in to meet the particular conditions applicable to this particular industrial track, and to comply, as it thought, with the order of the Georgia Railroad Commission dated April 29, 1921, a copy of said contract as submitted being hereto attached, marked Exhibit No. 3, but not for copy.

It will be observed from said Exhibit No. 3 and from the contents of Exhibit No. 2 that the Western & Atlantic Railroad offered to pay $877.02, in the manner provided in said General Order No. 15 and Supplements One and Two thereof, and requested the Farmers Warehouse Company to pay only $389.22 of the initial cost of the construction of said track and to sign the usual standard form of contract, the initial construction cost being $1,266.24.

However, said Farmers Warehouse Company refused to agree to pay any part of the expense of the Construction of said track and refused to sign said contract, and the Railroad Commission of the State of Georgia ordered the Western & Atlantic Railroad, as set out supra, to construct, maintain and operate at its (the railroad's) sole expense such track and have the same completed not later than September 14, 1921.

VIII.

That said Farmers Warehouse Company is located at the town of Smyrna, Georgia, on complainant's line, which town has a population of seven hundred and twenty-one (1920 census). Smyrna is fifteen miles from Atlanta, Ga. and one hundred and twenty-two miles from Chattanooga, Tenn., is not an industrial center and is

located in a community primarily agricultural and by no means populous.

The Western & Atlantic Railroad has at Smyrna, Ga. large, commodious freight facilities, including both team track and warehouse,
7 sufficient to take care not only of all present business of all parties, but any probable increase thereof. A photograph of said depot and freight house is hereto attached, marked Exhibit No. 4, but not for copy.

At said place, the Western & Atlantic Railroad has a main line and passing track and a house or team track located in front of said depot. On this house or team track and at said depot all the carload traffic, inbound and outbound, is now comfortably and properly handled.

The Farmers Warehouse Company has a warehouse and shed almost directly opposite said depot, distant therefrom by air line approximately sixty feet and distant from the house track by the road, which is passable in all sorts of weather, three hundred and seventy-five feet. A full, complete and accurate map of this position of the town of Smyrna is attached hereto, marked Exhibit No. 5 but not for copy.

Pictures showing the transportation facilities and nearness of said warehouse to said depot and the size and nature of said warehouse and the road connecting said warehouse with said depot, are also attached hereto, marked Exhibits 6, 7, 8, 9, 10, 11, and 12, but not for copy.

That the facilities provided by the Western & Atlantic Railroad at Smyrna are entirely adequate to properly take care of all the business, inbound and outbound, at that place, including the business of the Farmers Warehouse Company.

The Farmers Warehouse Company has and can continue, without any undue inconvenience or cost, to send and receive freight just as all other shippers and consignees at and near Smyrna and as it now does.

IX.

That the total revenue from passenger and freight, carload and less than carload, received and forwarded at the town of Smyrna, Ga. for the six months ending June 30, 1921, was only $5,554.32, and of this amount, during the same period, the total business of the Farmers Warehouse Company, in business forwarded and received, was only $392.67. A full, detailed statement showing all said business, freight and passenger, by months, is attached hereto, marked Exhibit No. 13, but not for copy.

The Farmers Warehouse Company was organized, as your complainant, is informed and believes and on information states, early in 1920 and said warehouse, pictures of which are referred to supra, was completed in the month of April, 1920.

Said warehouse is in size about thirty by sixty feet, one
8 story, made of plain framing with galvanized iron siding and composition roofing. To it is attached a shed. The cost,

your complainant submits on information and belief, being about one thousand dollars.

The gross business of the Farmers Warehouse Company, inbound and outbound, interstate and intrastate, carload and less than carload, from May 8, 1920 to and including July 31, 1921, was only $1,342.14, or a gross revenue of a little less than $90.00 per month, during *in* which period complainant and The Nashville, Chattanooga & St. Louis Railway were not able to earn their operating expenses and fixed charges, a statement of the financial results of operation being hereto attached marked Exhibit No. 14 but not for copy.

A detailed statement of all said business, separated as to interstate and intrastate, inbound and outbound, is hereto attached, marked Exhibit No. 15, but not for copy.

Neither the location of the Farmers Warehouse Company nor the nature and extent of its business differentiates its traffic requirements from other patrons of complainant's road at Smyrna and similar stations along complainant's line. It has no more need for a private siding than many other small shippers at and near Smyrna. As aforesaid, complainant's physical facilities at Smyrna, as now constituted, are thoroughly adequate to properly handle all present business and any normal increase. Said siding, if constructed, by reason of its location and construction would and could serve only the Farmers Warehouse Company and would add nothing to the actual or potential earning power of your complainant, but on the contrary, would increase its maintenance and operating expenses without compensation.

X.

The Farmers Warehouse Company is not an old, established concern, but, as your complainant is informed and believes and on information states, is not yet two years old. How long it will remain in business and the extent of the business no one knows. It has made no guarantee of any sort to your complainant that it will remain in business any given time or will furnish any particular volume of business.

XI.

9 Your complainant does not keep, and the traffic does not justify the keeping, of a switch engine at Smyrna. In order to operate this private track, if constructed, and deliver and receive cars onto and from the same the road engines of your complainant's trains would have to put cars in and take them out of said track, thereby increasing your complainant's operating expenses and delaying the movements of inter and intrastate freight, interfering also with the prompt and proper movement of traffic over said line, which is largely single track.

Your complainant in connection with the Nashville, Chattanooga & St. Louis Railway operates fast freight and passenger service with its connections from Chicago and any delays in the handling of local trains burdens and interfers with such interstate traffic.

The interest on the money which your complainant would have to invest in said track, if constructed conformably with the order of the Railroad Commission of Georgia, depreciation charges, necessary maintenance and operating expenses would exceed $200 a year, the amount of excess depending upon the amount of the Farmers Warehouse Company's business. It would unduly, unreasonably and unnecessarily hamper and delay it in the proper operation of its interstate trains, and would impose upon it expenses and costs without any compensation because the Farmers Warehouse Company would not be required to pay it any additional charges or rates for transportation of freight or for the delivering and receiving thereof on said private siding over and above that paid by other shippers, who receive and load their freight on the public team track and at the public depot.

In other words, if said order of the Georgia Commission be complied with, the Farmers Warehouse Company will receive a valuable service, a service in addition to what others similarly situated receive, and pay nothing therefor, hence your complainant, the Western & Atlantic Railroad, would not add anything to its earnings by reason of the comstruction, maintenance and operation of said expensive private siding, and hence would be deprived of its property without due process of law.

XII.

Your complainant and The Nashville, Chattanooga & St. Louis Railway have adopted a standard form of contract for the construction of private sidings, a copy of which with the blanks filled in to meet the requirements of this particular siding, is already attached hereto as Exhibit No. 3. Your complainant, the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway have an established, fixed policy, based upon General Order No. 15 of the United States Railroad Administration and Supplements Nos. 1 and 2 thereto, for the construction costs of private or industrial sidings. Copies of said General Order No. 15 and Supplements Nos. 1 and 2 thereto are hereto attached, marked Exhibit No. 16 but not for copy.

Your complainant and The Nashville, Chattanooga & St. Louis Railway treat all shippers, interstate and intrastate, in Georgia, Alabama, Kentucky and Tennessee alike. There is no discrimination and no preference. Under similar circumstances and conditions each individual and industry is treated alike, this being necessary in order to comply with the Interstate Commerce Act and various state laws with reference to discrimination and preferences.

The order of the Railroad Commission of the State of Georgia, if obeyed, would compel your complainant to depart from its fixed, standard policy, which is a reasonable policy, and in general line, as your complainant is informed and believes, with the policy of all standard railroads in the United States, and discriminate against all shippers, interstate and intrastate, in the States of Kentucky,

Tennessee, Alabama and Georgia, in favor of the Farmers Warehouse Company alone.

Further, the refusal of the Farmers Warehouse Company to sign said standard form of contract, would impose, if said track be constructed and operated, an additional burden upon your complainant by reason of the risk it would run from setting out fire. It is, and long has been, the fair, reasonable policy of your complainant and The Nashville Chattanooga & St. Louis Railway, and as your complainant is informed and believes, of all standard railroads in this country, to require private industries to waive claims for damage resulting from fire incident to the operation and use of industrial sidings. The refusal of the Farmers Warehouse Company to sign such standard contract, therefore, imposes this constant additional danger upon your complainant.

XIII.

Your complainant therefore avers that Section 2664 of the 1910 Georgia Code, quoted under Section VII supra, as construed and actually applied by the Railroad Commission of Georgia
11 violates the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States and the Interstate Commerce Act in that it (*a*) authorizes the taking of complainant's property without due process of law, (*b*) imposes a direct and serious burden upon and unreasonably interferes with interstate commerce (*c*) directs undue and unreasonable preferences in favor of shippers of interstate commerce in Georgia.

XIV.

Your complainant further avers that said order of the Railroad Commission of Georgia requiring it, at its sole expense, without additional income whatsoever, to construct, maintain and operate said track, is illegal, null and void in the following particulars and for the following reasons:

(*a*) If said track be considered a pure private convenience, (which your complainant avers to be the fact), then the same is null and void because it requires your complainant, a public service corporation, to expend money for purely private business, without any compensation whatever, thereby depriving your complainant of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(*b*) Further, the terms under which the said Railroad Commission ordered the construction thereof, (requiring complainant to construct and maintain said track at its sole expense), are so palpably unreasonable as to amount, as a matter of law, to an abuse of discretion, (said track by reason of its construction and location being incapable of use by any others than the Farmers Warehouse Company), hence is void as being non-compensatory, unremunerative, confiscatory and depriving your complainant of its property without

due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(c) That said order, under the facts, is per se unreasonable and void because it compels your complainant to construct a spurtrack or siding at Smyrna, Ga. for one industry alone at its sole expense where the accommodations are already physically adequate, and because your complainant would be compelled, if it obeyed the order, to reduplicate at its sole expense, without any compensation,
12 already physically adequate accommodations.

(e) Said order, if obeyed, would impose a direct and unreasonable burden and would constitute an unreasonable interference with interstate commerce, because it would compel the extra delay and expense of switching to and from said siding, without compensation, when accommodations sufficiently adequate are now provided, thereby delaying and interfering with interstate commerce and increasing the cost of operation for the sole convenienec of one shipper, the Farmers Warehouse Company.

(e) That said order, if obeyed by your complainant, would compel it to discriminate against all shippers, interstate and intrastate, and prefer the Farmers Warehouse Company by compelling your complainant to depart from its fixed, standard, policy, which is fair and reasonable, in the construction and maintenance of industrial sidings, such discrimination and preference being contrary to the Interstate Commerce Act, Sections 2 and 3.

XV.

Your complainant has no adequate remedy at law and should it fail to construct and maintain at its sole expense said private siding, it would, in accordance with the provisions of Section 2667 of the 1910 Georgia Code above quoted, be subjected to the excessive fines and penalties of $5,000.00 for every day it disobeyed said order, and said company and every officer and agent thereof, failing to comply with said order would be guilty of a misdemeanor, under Section 2668 of the 1910 Georgia Code, hence your complainant cannot wait to have said order enforced becau-e the penalties are so enormous as to make that course impossible; and respondents, or some of them, unless restrained by order of this Honorable Court, (the statutes of Georgia providing neither an express nor an exclusive method whereby complainant may protect its interest and test the validity of said order), will institute proceedings either to compel a compliance with said order or to penalize your complainant, its officers and agents for a violation thereof, or both.

Your complainant further avers that unless said order of the Railroad Commission of Georgia be enjoined that it will either be subjected to the excessive fines and penalties above described or it will have to build said track, hence that it will suffer irreparable injury unless it obtains the relief herein sought and prayed for.

Your complainant further avers that only by a suit of this
13 nature and by the injunctive process of this Court can it be fully protected in the exercise and determination of its rights and avoid sustaining irreparable loss and injury.

XVI.

For as much, therefore, as your complainant is without remedy save in a court of equity and to the end that said Railroad Commission of Georgia and C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, individually and as all the members of said Commission; and Albert Collier, individually and as Secretary of said Commission; and James K. Hines, individually and as Special Attorney to said Commission; and George M. Napier, individually and as Attorney General of the State of Georgia; all being residents, citizens and inhabitants of the Northern District of Georgia, save John T. Boifeuillet, who is a citizen, resident and inhabitant of the Southern District of Georgia, shall be required to make full, complete and direct answer hereto, but not under oath, the answer under oath being waived hereby; complainant prays that the respondents and each of them and all of their attorneys, servants, agents, associates and employes may be enjoined and restrained preliminarily until final hearing and perpetually thereafter from in any manner instituting or authorizing or directing to be instituted, any prosecution or proceeding or suit or action incident to, arising from or growing out of your complainant's failure to obey said order of the Railroad Commission of the State of Georgia; and that Albert Collier, Secretary of the Railroad Commission of Georgia, may be also enjoined from issuing any certificates or preparing any copies of the proceedings and orders of the Railroad Commission of Georgia relative to the application of the Farmers Warehouse Company for the construction of the spur track in question, which certificate or copies might or could be used in undertaking either to enforce compliance with said order or exacting fines and penalties provided by statute for a violation thereof; and that James K. Hines, Special Attorney for the Railroad Commission of Georgia and George M. Napier, Attorney General of the State of Georgia, may be so enjoined and restrained from directing, authorizing or assisting in the institution of any proceeding either to *to* force your complainant to
14 comply with said order of the Railroad Commission of the State of Georgia or to exact penalties for the violation thereof.

And your complainant further prays that said Section 2664 of the 1910 Georgia Code as construed and actually applied by the Railroad Commission of Georgia and said order of the Railroad Commission of the State of Georgia be adjudged to be unconstitutional and void as hereinbefore claimed and *to* be held for naught and that your complainant, its officers, agents and employes be not required to observe or comply with the said order.

Furthermore, your complainant prays that a temporary restraining order, as provided by law, may issue restraining said respondents and each of them, their associates, attorneys, agents and employes, in

accordance with the prayer for a preliminary and perpetual injunction.

That said temporary restraining order may be served immediately upon each of said respondents and that complainant may have such other, additional and further relief as equity will require.

Complainant states it is willing, pending the final determination of the matters herein, to make bond or take such other and further action as to the Court may seem proper.

This is the first application for writ of injunction or temporary restraining order in this cause.

May it please Your Honor to grant unto this complainant not only a writ of injunction and temporary restraining order conformably to the prayer but also a writ of subpœna of the United States of America directed to the said respondents, to wit, Railroad Commission of Georgia; C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet, and James D. Price, as individuals and also as members constituting the Railroad Commission of Georgia; Albert Collier, individually and as Secretary of the Railroad Commission of Georgia; James K. Hines, individually and as Special Attorney to the Railroad Commission of Georgia; and George M. Napier, individually and as Attorney General of the State of Georgia, commanding them on a day certain to appear and answer this bill of complaint but not under oath, and to abide by and perform such order or orders and decree or decrees in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

And your complainant further prays that a duplicate writ
15 of subpœna may be issued for the respondent, John T. Boifeuillet, residing in the Southern District of Georgia, directed to the Marshal of said Southern District of Georgia commanding said Boifeuillet on a day certain to appear and answer this bill of complaint but not under oath, and to abide by and perform such order or orders, decree or decrees in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

THE WESTERN & ATLANTIC
RAILROAD,
By W. R. COLE,
President.

Attest:

[SEAL.] J. B. HILL,
Asst. Secretary.

TYE, PEEPLES & TYE,
FRANK SLEMONS,
FITZGERALD HALL,
Solicitors for Complainant.

STATE OF TENNESSEE,
County of Davidson:

I, Whitefoord R. Cole, being duly sworn, state as follows:

I am President of the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway. I am familiar with the controversy in question and have carefully read the above bill and all of the statements of fact therein made are true and accurate save these made on information and belief and I verily believe those to be true.

In my capacity as President, I am authorized to sign this bill and direct the Asst. Secretary, as I have done, to attach thereto the seal of the Western & Atlantic Railroad.

W. R. COLE.

Sworn to and subscribed before me, this 18 day of August, 1921.
[SEAL.] W. A. MILLER,
Notary Public.

Filed in office Aug. 22d, 1921.
O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy Clerk.

[Map endorsed on back:] Exhibit No. 5 in W. & A. R. R. vs. R. R. Commission of Ga. et als.

(Here follow photograph, Ex. No. 4, and map, Exhibit No. 5, marked pages 16 and 17.)

Negative B-505, Camera 76 feet east of our main track facing our depot and freight house, showing platform, gang plank and trucks, for handling freight and in extreme left hand corner of this picture shows scales that belong to warehouse.

Ex. N. 4

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, J. P. Anderson,
I am a civil engi
Division engineer of the Western &
I prepared the attached map, showi
ity of the Farmers Warehouse Compa
a complete and accurate representa
that place at the present time

Sworn to and subscribed
before me, this __day of August.19

Notary Public.

DEPOT.

375ft.

"X"

Post Office

Smyrna, Ga.

A15 C123

House Track.

Main Track.

Passing Track.

14'

14'

To Atlanta.

14'

93'

Tel Pole

13'

Proposed Spur Track 265ft. Long

Tel Pole

Proposed 3" Pipe Line 110' Long Tel. Pole

Pipe Lines

42'

75'

Future Platform

Door

Wagon Scales

Farmers Warehouse

30'

Clearance Point

185ft.

End of Spur

80ft.

Shed

20'

60'

Door

Point of Switch A.

RIGHT OF WAY LINE

ROAD.

Gate

Res.

Res.

Res.

Res.

Res.

Exhibit No 5
in
W. & A. R. R.
vs.
R. R. Commission of
Ga. et als.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, J. P. Anderson, being duly sworn, state as follows:
I am a civil engineer located in the office of the Division engineer of the Western & Atlantic Railroad at Atlanta, Georgia. I prepared the attached map, showing tracks and buildings in the vicinity of the Farmers Warehouse Company at Smyrna, Georgia. This map is a complete and accurate representation of the situation as obtains at that place at the present time

Sworn to and subscribed
before me, this __day of August.1921.

Notary Public.

DEPOT.

375ft.

"X"

Post Office

Smyrna, Ga.

House Track.

Main Track.

Passing Track.

14'

14'

A 15 C 123

Tel. Pole

Proposed 2" Pipe Line 40' Long Tel. Pole

4 Pipe Lines

ur Track 265ft. Long

Future Platform

Door

42'

Wagon Scales.

Farmers Warehouse

Clearance Point "B"

30'

185ft.

Shed

60'

20'

Door

"Y"

ROAD.

Point of Switch "A"

RIGHT OF WAY LINE

To Chattanooga

33'

R.M. Rice. Store.

Res.

Res.

Res.

Res.

Exhibit No 5
in
W. & A. R.R.
vs.
R.R. Commission of
Ga., et als.

N.C.&St.L.RY

Map Showing Tracks & Buildings in Vicinity of The Farmers Warehouse Co. At Smyrna, Ga.

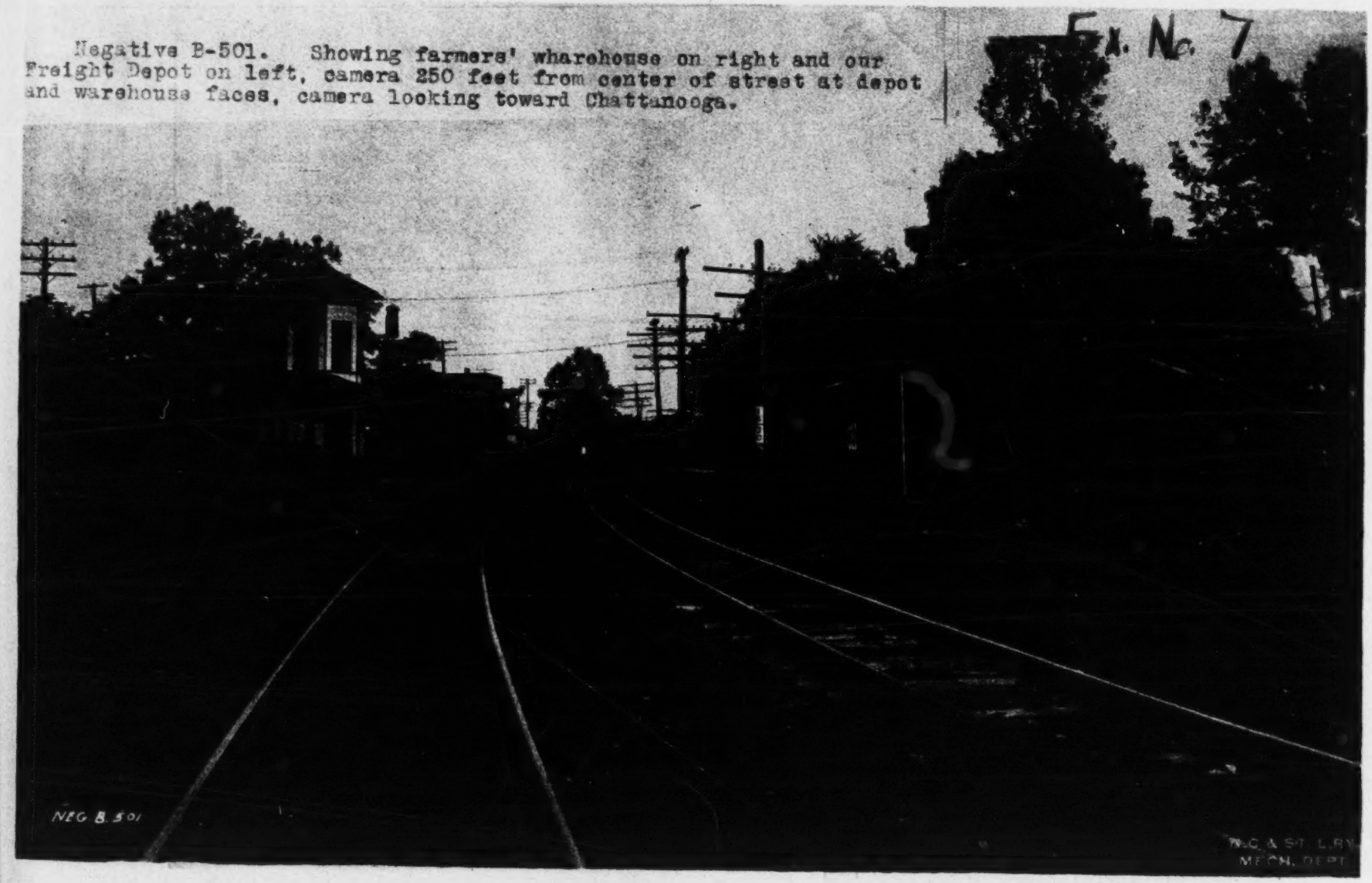
Office of Division Engineer.
Atlanta, Ga. Aug. 3-1921.
Scale 1"=10' Del. J.P.A.

Negative B-500. Camera in center of main track 150 feet from center of street, looking toward Atlanta, showing Farmers' Warehouse and our Freight Depot at Smyrna, Ga., 15 miles from Atlanta.

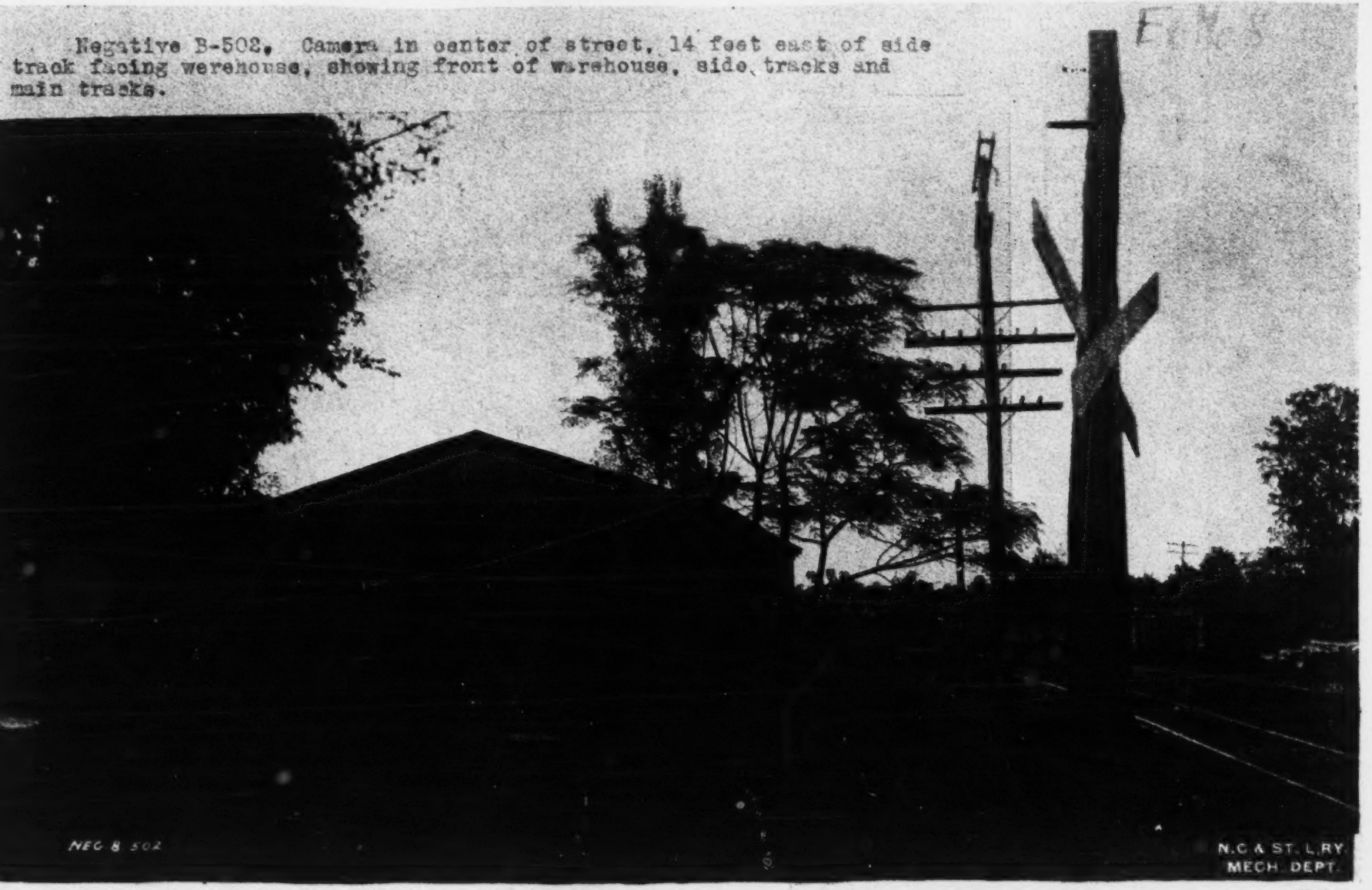
Ex. No. 6

Negative B-501. Showing farmers' wharehouse on right and our Freight Depot on left, camera 250 feet from center of street at depot and warehouse faces, camera looking toward Chattanooga.

Ex. No. 7

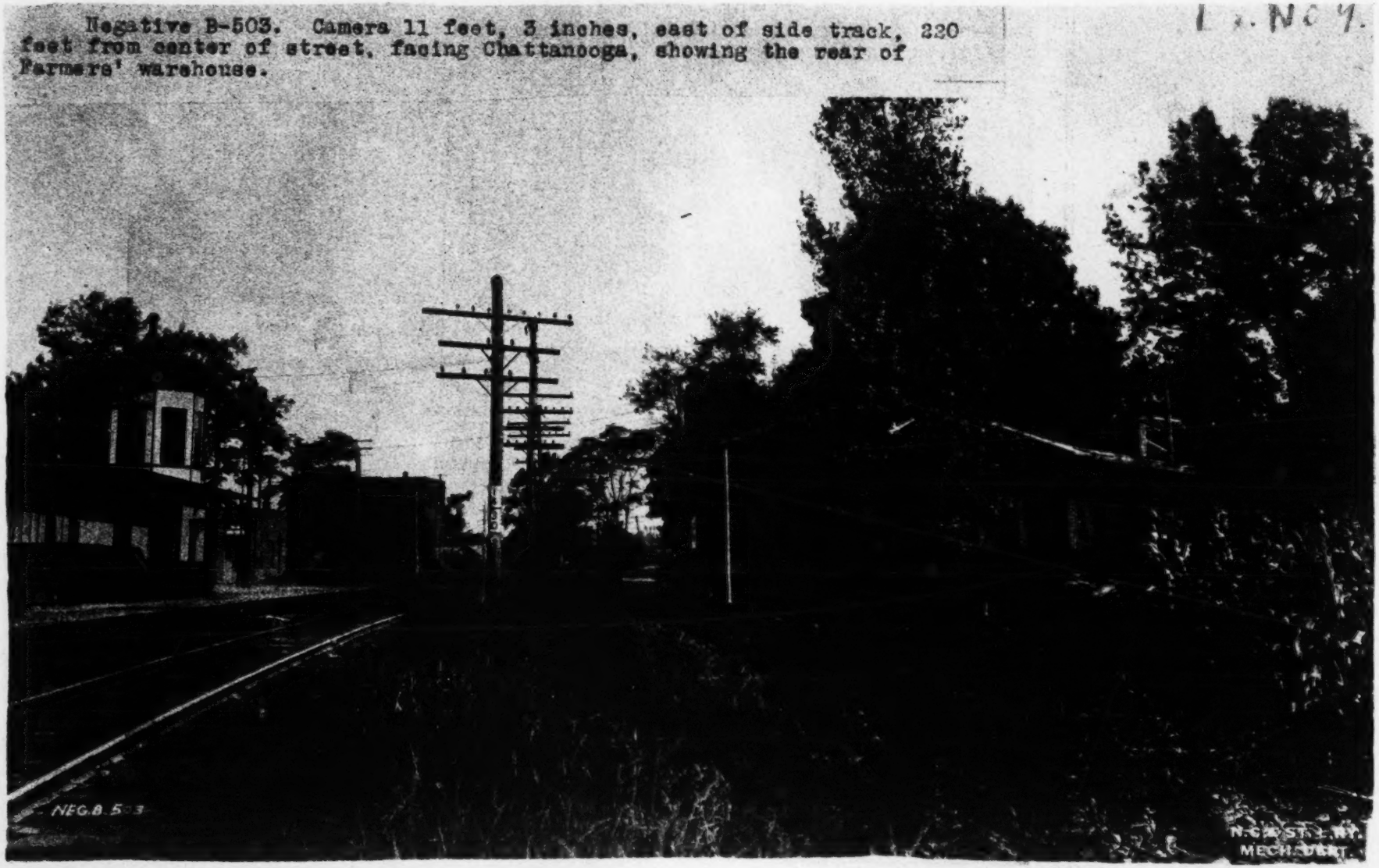


Negative B-502. Camera in center of street, 14 feet east of side track facing warehouse, showing front of warehouse, side tracks and main tracks.

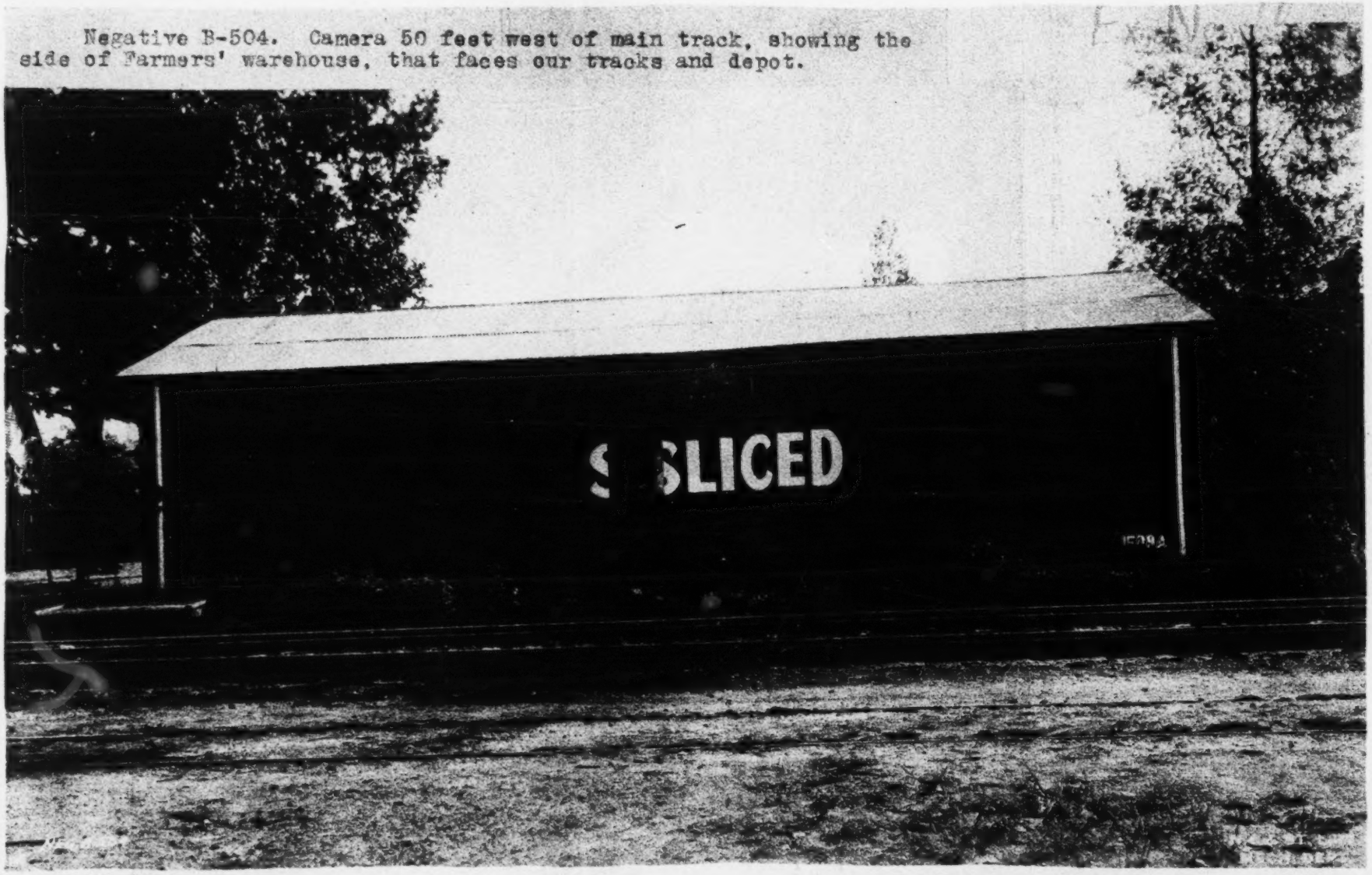


Negative B-503. Camera 11 feet, 3 inches, east of side track, 220 feet from center of street, facing Chattanooga, showing the rear of Farmers' warehouse.

I. N. C. Y.

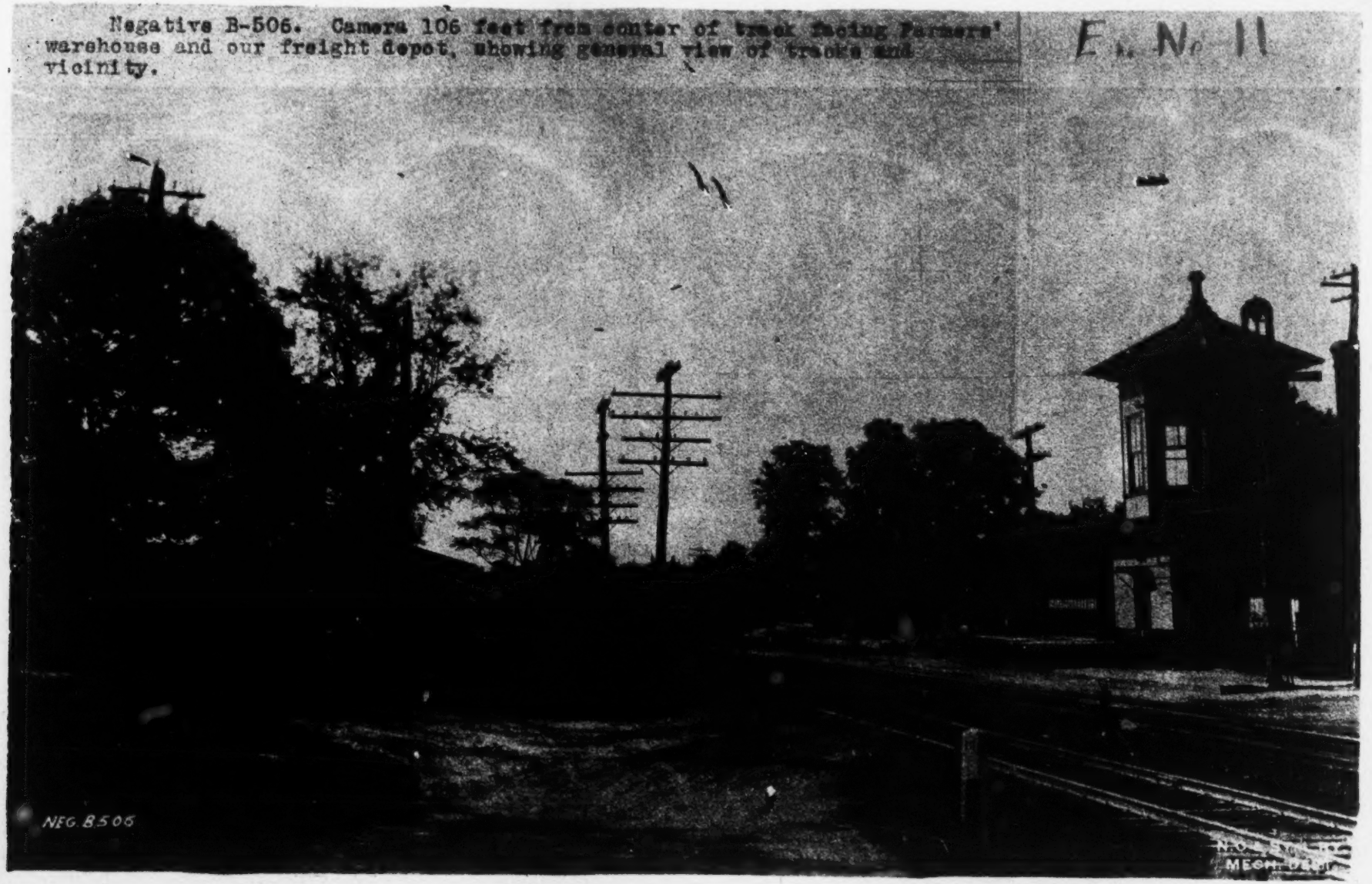


Negative B-504. Camera 50 feet west of main track, showing the side of Farmers' warehouse, that faces our tracks and depot.



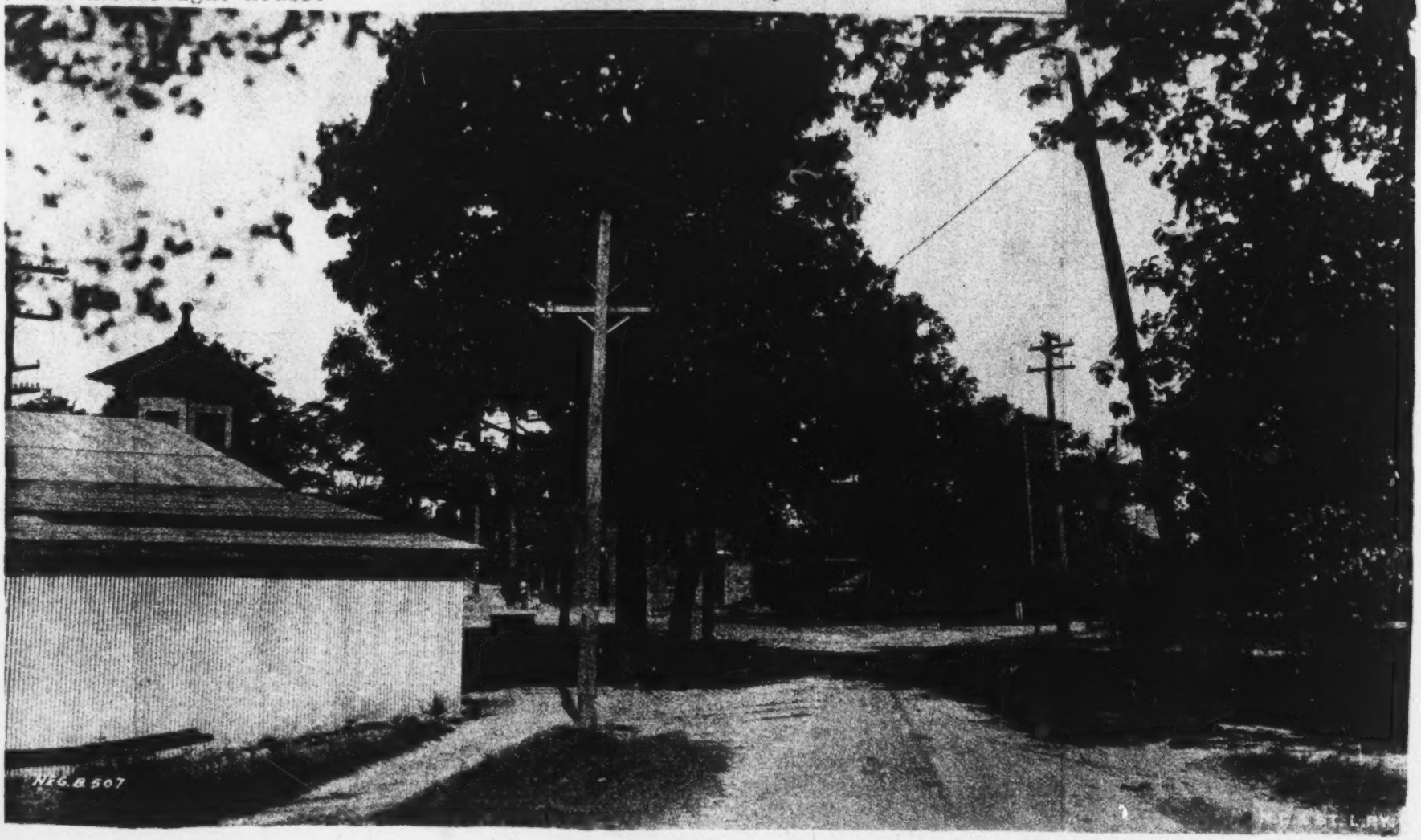
Negative B-506. Camera 106 feet from center of track facing Farmers' warehouse and our freight depot, showing general view of tracks and vicinity.

E. L. No. 11



Negative B-507. Camera 210 feet from center of street and railroad track, showing the Farmers' Warehouse on the left and over top the cupola of the freight house.

Ex. No. 12



18 STATE OF TENNESSEE,
County of Davidson:

I, H. C. Hill, being duly sworn, state as follows:

I am the official photographer of The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad. The attached pictures, being Exhibits Nos. 4, 6, 7, 8, 9, 10, 11 and 12, were taken by me personally at Smyrna, Georgia, on August 12, 1921, and correctly and fairly represent the situation as it exists at that place at the present time. The notations on each picture as to the location of the camera were prepared by me personally and are correct.

H. C. HILL.

Sworn to and subscribed before me, this 15 day of August, 1921.

W. A. MILLER,
Notary Public.

(Here follow photographs marked pages 19-25, inclusive.)

26 EXHIBIT 16.

W. & A. R. R.

VS.

R. R. COMMISSION OF GA. et al.

General Order No. 15.

Washington, March 26, 1918.

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(*a*) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company.

(*b*) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point.

(*c*) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line.

(*d*) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition.

(*e*) The railroad company shall have the right to use the track when not to the detriment of the industry.

(*f*) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention of the regional director, who will report thereon to the Director General, if conditions seem to warrant.

4. The requirements of State statutes and of State commissions in respect of the construction, maintenance, and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United

States Railroad Administration the circumstances should be brought to the attention of the regional director, who will report thereon to the Director General, if the conditions seem to warrant.

W. G. McADOO,
Director General of Railroads.

Supplement No. 1 to General Order No. 15.

Washington, December 5, 1918.

General Order No. 15, dated March 26th, 1918, is hereby supplemented as follows:

1. General Order No. 15 is not to be construed as requiring or authorizing a Federal Manager to enter into a contract on behalf of the Director General to pay for that part of an industry track on the right of way from the switch point to the clearance point where, in the judgment of the Federal Manager, the amount of traffic to be derived by the United States Railroad Administration from the construction of the industry track is not sufficient to justify such expenditure. In cases where, in the judgment of the Federal
27 Manager, the circumstances justify the construction of an industry track, but the amount of revenue to be derived therefrom by the United States Railroad Administration does not justify the payment by the Director General of the cost of that part of the track on the right of way from the switch point to the clearance point, an agreement may be made, otherwise in accordance with General Order No. 15, but providing for the payment of the entire cost of the track by the shipper with a provision for refund up to, but not exceeding, the cost of the part of the track from the switch point to the clearance point, at the rate of two dollars ($2.00) per car of carload freight yielding road haul revenue, delivered on or shipped from the track during Federal control.

2. Track material contained in that portion of an industry track on the railroad right of way which was installed and paid for by the industry during Federal control shall remain the property of the industry, except to the extent that refund of the cost thereof shall have been made by the railroad or the Director General, but such ownership shall be subject to the right of the railroad to use the track when not to the detriment of the industry.

3. Upon the discontinuance of use of an industry track for the purposes of the industry, the industry shall have the right to have the track material on the right of way which was paid for by the industry during Federal control taken up and delivered to the industry, except to the extent that the cost of such track material shall have been refunded to the industry by the railroad or the Director General. The work of taking up the track shall be done, if the Federal Manager shall so desire, by the forces of the Federal Manager, but in any event at the expense of the industry.

W. G. McADOO,
Director General of Railroads.

Supplement No. 2 to General Order No. 15.

Washington, August 9, 1919.

General Order No. 15, dated March 26, 1918, is hereby supplemented, as follows:

Paragraph 2 of General Order No. 15 is hereby changed to read as follows:

written contract as to the maintenance of an industry track contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof. In the absence of a written contract as to the maintenance of an industry track constructed prior to March 26, 1918, the practice of the connecting carrier prior to Federal control, as applied to such track of any particular industry from the beginning of its use by such industry, shall be considered as equivalent to a written contract in accordance with such practice.

W. G. McADOO,
Director General of Railroads.

28 *Order to Show Cause.*

Read and Considered. Let the foregoing bill of complaint be filed and subpœnas issued as prayed.

All the defendants are ordered to show cause before me and such other Judges as may be called to my assistance at Atlanta, Georgia, on the 3d day of September, 1921, why injunction pendente lite should not issue as prayed preventing the defendants, or any of them, from instituting any proceeding for the purpose of enforcing, or from endeavoring to enforce, the orders of the Railroad Commission of Georgia of April 29th, 1921, and July 16th, 1921. In order to prevent irreparable loss or damage to complainant leave is given should the hearing not then occur to ask that said defendants each and all be temporarily restrained from enforcing, or endeavoring to enforce, the said orders of the Railroad Commission of Georgia of April 29th, 1921, and July 16th, 1921, until the further order of this Court.

Let the service and notices provided by law be had forthwith. August 22, 1921.

SAM'L H. SIBLEY,
U. S. Judge.

Acknowledgment of Service and Further Service Waived.

Due and legal service within petition and order thereon acknowledged. Copy received. Further service and subpœna waived. This August 23rd, 1921.

JAMES K. HINES,
Att'y for Defendants.

Filed in Clerk's Office Aug. 23, 1921.

O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy.

29 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD

vs.

RAILROAD COMMISSION OF GEORGIA et al.

To the Honorable Geo. M. Napier, Attorney General of the State of Georgia:

Conformably with the requirements of Section 266 of the Judicial Code, being the Judiciary Act of the Congress of the United States, approved March 3rd, A. D. 1911, and as amended by subsequent Acts of Congress, notice is hereby given that application has been made by the Western & Atlantic Railroad, the complainant in the above case, for an interlocutory injunction to restrain the enforcement of the orders of the Railroad Commission of Georgia of April 29th, 1921 and July 14th, 1921 (a copy of which orders is hereto attached) upon the ground that said orders are unconstitutional, and that a hearing upon said application, has been set by the Honorable Samuel H. Sibley before himself and such other Judges as he may call to his assistance, at Atlanta, Georgia, on September 3rd, 1921.

TYE, PEEPLES & TYE,
FRANK SLEMONS,
FITZGERALD HALL,
Solicitors for the Western & Atlantic Railroad, Complainant.

Due service of the above and foregoing notice acknowledged. This August 23rd, 1921.

SEWARD M. SMITH,
Asst. Atty. General of the State of Georgia.

30 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD

vs.

RAILROAD COMMISSION OF GEORGIA et al.

To the Honorable Thomas W. Hardwick, Governor of the State of Georgia:

Conformably with the requirements of Section 266 of the Judicial Code, being the Judiciary Act of the Congress of the United States, approved March 3rd, A. D., 1911, and as amended by subsequent Acts of Congress, notice is hereby given that application has been made by the Western & Atlantic Railroad, the complainant in the above case, for an interlocutory injunction to restrain the enforcement of the orders of the Railroad Commission of Georgia of April 29th, 1921 and July 14th, 1921 (a copy of which orders is hereto attached) upon the ground that said orders are unconstitutional, and that a hearing upon said application, has been set by the Honorable Samuel H. Sibley before himself and such other Judges as he may call to his assistance, at Atlanta, Georgia, on September 3rd, 1921.

TYE, PEEPLES & TYE,
FRANK SLEMONS,
FITZGERALD HALL,
Solicitors for the Western & Atlantic Railroad, Complainant.

Due service of the above and foregoing notice acknowledged. This August 23rd, 1921.

MYRTLE WHITE,
Secy. of Executive Dept. of the State of Georgia.

31 In the District Court of the United States for the Northern Division of the Northern District of Georgia.

In Equity.

THE WESTERN & ATLANTIC RAILROAD COMPANY, Complainant,

versus

RAILROAD COMMISSION OF GEORGIA et al., Respondents.

Now comes the Railroad Commission of Georgia, Chas. Murphey Candler, Paul B. Trammell, Jas. A. Perry, John T. Boifeuillet, and J. D. Price, individually and as members of said Commission, Albert

Collier, individually and as Secretary of said Commission, Jas. K. Hines, individually and as Special Attorney for said Commission, and Geo. M. Napier, individually and as Attorney General of the State of Georgia, respondents in the above stated cause; and jointly and severally move to dismiss the bill of complaint in said case on the following grounds, towit:

1.

Because no cause of action is set out therein.

2.

Because complainant is not entitled to any equitable relief, and especially to the extraordinary remedy of injunction under the facts stated in its bill of complaint.

3.

Because the matter in dispute between complainant and these respondents, in said bill of complaint, does not exceed the sum of Three Thousand Dollars, exclusive of interest and costs; and for this reason this Court is without jurisdiction to hear and determine said controversy.

4.

Because it appears from the face of the bill of complaint filed in this cause that this case does not really and substantially involve a suit or controversy properly within the jurisdiction of this Court, in that the amount or the value of the subject matter in dis-
32 pute, as appears from the bill, does not exceed the sum of Three Thousand Dollars, exclusive of interest and costs.

Wherefore respondents pray that the bill be dismissed and that they have judgment for costs.

(Sig.) JAMES K. HINES,
Solicitor for Respondents.

33 In the District Court of the United States for the Northern Division of the Northern District of Georgia.

In Equity.

THE WESTERN & ATLANTIC RAILROAD COMPANY, Complainant,

versus

RAILROAD COMMISSION OF GEORGIA et al., Respondents.

Now come the Railroad Commission of Georgia, Chas. Murphey Candler, Paul B. Trammell, Jas. A. Perry, John T. Boifeuillet, and J. D. Price, individually and as members of said Commission, Albert Collier, individually and as Secretary of said Commission, Jas. K.

Hines, individually and as Special Attorney for said Commission, and Geo. M. Napier, individually and as Attorney General of the State of Georgia, respondents in the above stated cause; and for answer to the bill of complaint in said case say:

1.

These respondents admit the allegations of paragraphs one, two, five and six of said bill of complaint.

2.

These respondents admit the allegations of paragraph three of said bill of complaint, except as herein qualified. They deny that the side track in controversy will be a private side track; but on the contrary say that the same will be erected entirely on the right of way of complainant will be part of its general facilities for serving the public, and will be a public side track.

3.

These respondents deny the allegations of paragraph four of said bill of complaint; and say that it appears from the face of complainant's bill that the matter in controversy does not exceed the sum or value of Three Thousand Dollars.

34 4.

These respondents admit the allegations of paragraph seven of said bill of complaint, exeept as herein qualified.

These respondents deny that the contract submitted by complainant to the Farmers Warehouse Company complies with the order of the Railroad Commission of Georgia of April 29th, 1921.

5.

These respondents deny the allegations of paragraph eight of said Bill of Complaint, except as herein admitted. They admit that Smyrna is 15 miles from Atlanta, Georgia, 122 miles from Chattanooga, Tennessee, is not an industrial center, and is located in a community primarily agricultural.

These respondents admit that the photograph, attached to its bill, is a correct one of complainant's depot and freight warehouse at Smyrna.

Respondents admit that Farmers Warehouse Company has a warehouse and shed almost directly opposite said depot, distant therefrom by airline approximately 60 feet, and distant from the warehouse track by the road, which is passable in all sorts of weather, 375 feet.

6.

From lack of information these respondents can neither admit nor deny the allegations of paragraph nine of said bill of complainant, except as herein qualified.

These respondents admit that Farmers Warehouse Company was organized and complete as alleged in said paragraph.

These respondents admit that the warehouse therein referred to is of the dimensions therein states, and is made of the material stated. On information and belief these respondents deny that said warehouse and the shed subsequently built thereto cost about One Thousand Dollars; but on the contrary cost much more.

These respondents deny the allegation that neither the location of the Farmers Warehouse nor the nature and extent of its business differentiates its traffic requirements from other patrons of complainant's road at Smyrna, and similar stations along complainant's line.

35 Respondents deny the allegation that Farmers Warehouse Company has no more need for a private siding *that* many other small shippers at or near Smyrna, and that complainant's facilities at Smyrna, as now constituted, are thoroughly adequate to properly handle all present business and any normal increase.

Respondents deny the allegation that said siding, if constructed, by reason of its location and construction, would and could serve only said Farmers Warehouse Company, and would add nothing to the actual or potential earning power of complainant, and would increase its maintenance and operating expenses without compensation.

On the contrary these respondents, on information and belief, allege that said Farmers Warehouse Company, if said side track were put in, would furnish substantial additional tonnage for transportation by complainant, and would receive at its warehouse substantial additional tonnage for patrons thereof. Said Farmers Warehouse Company proposes to receive and store cotton, cotton seed, and other products for its patrons, which it can not do unless said side track is provided. Farmers and others who wish to store cotton at said warehouse will not do so if the same has to be drayed from the said warehouse to the depot of complainant for shipment. Said Farmers Warehouse Company proposes to purchase, store and ship cotton seed from its warehouse over the line of railway of complainant. These cotton seed will be bought in wagon load lots or smaller quantities from farmers in the vicinity of Smyrna, and shipped by said Farmers Warehouse Company in car load lots to oil mills in this State. The compensation which said Farmers Warehouse Company would receive from buying, storing and shipping such cotton seed is so small, that said Company cannot handle them if the same have to be drayed from its warehouse to the depot of complainant, as these respondents are informed and believe. The margin of profit in said business is so small that it will not justify the draying of said seed from said warehouse to said depot.

These respondents are informed and believe and so allege that said Farmers Warehouse Company proposes to erect a public gin and a potato house for the storage and curing of sweet
36 potatoes, adjacent to said side track. The latter enterprise, as these respondents are informed and believe and allege, can not be successfully handled unless such potato house is furnished with side track facilities.

In addition complainant under the rules of the Railroad Commission of Georgia will receive a switching charge for each car placed on said side track for discharging or receiving freight.

7.

These respondents admit the allegations of paragraph ten of said bill of complaint. While the allegations of said paragraph are true, said Farmers Warehouse Company has built a substantial warehouse up to the line of the right of way of complainant, upon the promise of complainant to furnish it with side track facilities. In all human probability the business of said Warehouse Company will be permanent.

8.

These respondents deny the allegations of paragraph eleven of said bill of complaint, except as herein qualified. They admit that the traffic does not justify the keeping of a switch engine at Smyrna, and that in order to operate this side track, which will be a public and not a private one, if constructed, and to deliver and receive cars on to and from the same, complainant's road engines would have to put the cars in and take them out of said track.

9.

From lack of information these respondents can neither admit nor deny the allegations of paragraph twelve of said bill of complaint, except as herein qualified. On information and belief these respondents say that complainant and the Nashville, Chattanooga and St. Louis Railway have adopted a standard form of contract for the construction of private sidings; but these respondents say that the side track in question being a public one said contract does not apply thereto.

Furthermore these respondents say, that complainant can
36½ not adopt any form of contract for private or public sidings, which will defeat the power and authority of this Commission to direct the construction of side track whenever the same are practicable, and the business done thereat justify the same. Under the law the Railroad Commission of Georgia is authorized to fix the terms and conditions upon which private side tracks may be constructed. Furthermore the public duty of complainant to construct public side tracks whenever necessary requires their construction at the expense of the carrier.

10.

These respondents deny the allegations of paragraphs thirteen and fourteen of said bill of complaint.

11.

These respondents deny the allegations of paragraph fifteen of said bill of complaint, except as herein qualified. They admit that complainant would be subjected to a penalty not to exceed Five Thousand Dollars, if it disobeys said order, the amount of said penalty to be fixed by the judge trying the suit brought to recover the same.

The averments of said paragraph being conclusions of law, these respondents submit that no answer is required from them.

12.

These respondents deny the allegations of paragraph sixteen of said bill of complaint, except as herein qualified. They admit that the residence- of the respondents are correctly given in said paragraph.

These respondents deny that complainant is entitled to any of the relief prayed in said paragraph.

13.

These respondents, in further answer to said bill of complaint, say that the side track which the Railroad Commission of Georgia has ordered constructed under its Order which is attacked by complainant, is a public side track and not a private one; that the same is demanded by public necessity, as warehouses and other structures for the storage and shipment of heavy freight, such as cotton,
37 cotton seed, sweet potatoes, et cetera, can not be constructed on the present side and team track of the complainant at Smyrna; that goods such as the above, when stored in warehouses can not be conveniently, economically and successfully handled, when the same have to be drayed from warehouses to railroad depots; and that it is customary to erect such structures upon or adjacent to the right of way of the railroad, and to have the same served by side tracks, whenever the public demand and necessity require the same.

Under the contract submitted by complainant to the Farmers Warehouse Company for acceptance and execution, complainant reserves the right to use the same when not to the detriment of said industry, thus recognizing that there is a need and demand for said side track other than to serve said Farmers Warehouse Company alone.

Respondents further say that, on information and belief, said side track will meet a public necessity at Smyrna, in the shape of a

warehouse for cotton, a storage house for sweet potatoes, a public gin, and probably other industries which require side track facilities and which will add to the business of complainant, and increase its revenues.

Furthermore respondents say that complainant will be entitled to the usual switching charges for all cars placed on said siding at said warehouse for loading and unloading.

Having fully answered said bill of complaint these respondents pray to be hence dismissed with their costs in this behalf expended.

(Sig.) JAMES K. HINES,
Solicitor for Respondents.

Northern Division of the Northern District of Georgia.

GEORGIA,
Fulton County:

Before the undersigned, an officer of said State duly authorized to administer oaths, in person came J. A. Perry and John T. Boifeuillet and J. D. Price, respondents in this cause, who on oath depose and say that the facts stated in the foregoing answer, when stated of their own knowledge, are true, and when stated on information and belief, they believe them to be true.

(Sig.) J. A. PERRY.
JNO. T. BOIFEUILLET.
J. D. PRICE.

Sworn to and subscribed before me, this the 9th day of September, 1921.

[SEAL.] ——— ———.
(Sig. of Officer.)

38 *Opinion.*

Before Hon. Nathan D. Bryan, Circuit Judge; Hon Beverly D. Evans and Samuel H. Sibley, District Judges.

Statement of the Facts.

An application for injunction pendent- lite and permanent was made by the Western & Atlantic Railroad against the Railroad Commission of Georgia, to prevent the enforcement of an order requiring the putting in of an additional side track at Smyrna, Georgia. The petition, though aver-ing the amount involved to be more than three thousand dollars, discloses that the total cost of the construction would be $1,260.00, and the estimated annual cost of maintenance to be $200.00. There is no allegation of the value of the land of the right of way to be occupied thereby.

SIBLEY, *District Judge:*

No right is involved of the violation of which this case is but an instance, because the general right of the Railroad Commission

to require the construction of side tracks is not questioned. The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but $1,260.00, and this amount alone is involved. The value of the portion of the right of way to be occupied by the track is not to be considered because the land is not taken from the Company but is only devoted to a railroad purpose, for which it was acquired and is held. The cost of future maintenance is not involved now because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, the question of its abondonment will be open then.

Because we think the amount involved is insufficient to give the Court jurisdiction, an injunction pendente lite will be refused.

This 12th day of September, 1921.

SAML. H. SIBLEY,
U. S. Judge.

39 Filed in Clerk's Office Sept. 12, 1921.

O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy.

Order.

This case coming on for hearing for preliminary injunction and involving a claim that an order of the Railroad Commission of Georgia is in violation of the Constitution of the United States, Honorable Nathan P. Bryan, Circuit Judge for the Fifth Circuit, and Honorable Beverly D. Evans, District Judge for the Southern District of Georgia, were summoned to the assistance of the judge of this Court.

After hearing evidence and argument before said Judges and they all concurring, it is considered and adjudged, for reasons stated in a memorandum filed herewith, that an injunction pendente lite be and the same is refused.

Upon announcement of this conclusion counsel for the complainant declaring a purpose to appeal and requesting the protection of the Court pending the preparation of such appeal, it is ordered that the defendants and each of them be restrained from in any manner enforcing the order complained of or any penalities for noncompliance therewith for a period of ten days from this date, or until the further order of the Court, it appearing that irreparable damage would otherwise accrue to the complainant.

This 12th day of September, 1921.

SAM'L H. SIBLEY,
U. S. District Judge.

Filed in Clerk's Office Sept. 12, 1921.

O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy Clerk.

40 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD, Complainant,

vs.

RAILROAD COMMISSION OF GEORGIA et al., Defendants.

Petition for Allowance of Appeal.

To the Honorable Samuel H. Sibley, District Judge:

The above named Western & Atlantic Railroad feeling aggrieved by the order and decree rendered and entered in the above entitled cause on the 12th day of September A. D. 1921 does hereby appeal therefrom to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that this its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record and proceedings and papers upon which said order and decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made, and petitioner further prays that at the time of the allowance of this appeal an order be made upon such terms as may be fixed by the Court restraining, during the pendency of this appeal, the defendants and each of them from in any manner enforcing the orders of the Railroad Commission of Georgia complained of or any penalties for non-compliance therewith, since without such restraining order irreparable damage
41 would accrue to the complainant.

FITZGERALD HALL,
H. C. PEEPLES,
Solicitors and Counsel for Complainant and Appellant, Western & Atlantic Railroad.

Filed in Clerk's Office Sep. 17, 1921.

O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

42 *Assignment of Errors.*

Now comes the Complainant in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in said cause from the order and decree made by this Honorable Court on the 12th day of September A. D. 1921.

I.

Error is assigned upon the said order and decree because the Court erred in refusing an injunction pendente lite on the ground that the amount involved was insufficient to give the Court jurisdiction.

II.

Error is assigned upon the said order and decree because the Court erred in refusing an injunction pendente lite on the ground that the amount involved was insufficient to give the Court jurisdiction, because the amount involved as shown by the allegations of the petition of Complainant in said cause was in excess of three thousand dollars, exclusive of interest and costs.

(*a*) And further because the matter in controversy in said cause as shown by the petition of Complainant and the evidence which was before the Court in said cause, exceeded, exclusive of interest and costs, the sum or value of three thousand dollars.

III.

Error is assigned upon said order and decree because it appeared from the petition of Complainant and the evidence which was before the Court in said cause that the matter in controversy included not only the total cost of construction of the spur or side track which the Railroad Commission order the Complainant to put in, wholly at Complainant's expense, but the cost of maintenance of the same
43 amounting to at least two hundred dollars per year, and the appropriation for said track of a considerable portion of the right of way of Complainant, of at least 265 feet in length, but also involved the question of the subjection of Complainant to penalties, should it disobey the orders of the Railroad Commission of Georgia complained of, of an amount not exceeding, but which within the discretion of the Judge trying a suit against Complainant for violation of said orders might be as great as, five thousand dollars a day for each day of such violation, and of the officers and agents of Complainant to prosecution as criminals for the guilt of a misdemeanor; and said matter in controversy involved, also, the right of Complainant to carry on interstate and intra-state business in the State of Georgia without being subjected to such orders of the Railroad Commission of Georgia, as were set forth and attacked in Complainant's petition, which so directly burdened such commerce as to amount to a regulation thereof, and the restraining of illegal interferences with

the property and business of Complainant, the asserted right to interfere therewith, it being the object of Complainant's petition to enjoin.

IV.

Error is assigned upon said order and decree because the same being based, as stated by the Court therein, upon the reasons stated in a memorandum filed therewith, the said reasons were insufficient to sustain said order and decree.

(*a*) Because the statement in said memorandum opinion that "The value of the portion of the right of way to be occupied by the track is not to be considered because the land is not taken from the Company but is only devoted to a railroad purpose for which it was acquired and is held," was and is erroneous since the effect of the orders of the Railroad Commission of Georgia, sought to be enjoined, if complied with or enforced, would be, as shown by the peti-
44 tion and evidence in the cause, to require complainant to devote a considerable portion of its right of way to the location, construction and maintenance of a track for the benefit alone of a private industry and not for the use of the public or for public purposes, or for the conduct of the business of complainant.

(*b*) Because the statement in said memorandum opinion that "The cost of future maintenance is not involved now because that is an incident of the future use," was and is erroneous, since the cost of future maintenance was directly involved now, not withstanding that said maintenance would be a cost to be borne after the construction of the side track, as under the orders of the Railroad Commission of Georgia which were sought to be enjoined, the construction of the track in question was of a thing to be permanent in its character, and to be maintained and operated as such, with no provision for the taking up of said track or its abandonment; and because the abandonment of such track would itself necessarily be expensive to complainant, and to be procured, if at all, by the consent of the Farmers' Warehouse Company, not reasonably to be anticipated, or by expensive and troublesome litigation.

V.

Error is assigned upon said order and decree because, under the pleadings and the evidence in the cause, it appeared not only that the matters in controversy therein, exceeded, exclusive of interest and costs, the sum or value of three thousand dollars, but that the enforcement of the orders of the Railroad Commission of Georgia, sought to be enjoined, would result in:

(1) Taking the property of the complainant for a private use.

(2) Or, taking the property of the complainant for a public use, without just and adequate compensation therefor.

(3) Forcing the complainant to discriminate in favor of
45 the Farmers' Warehouse Company as against the owners of other plants or industries similarly situated, who might desire the construction of sidings, spurs or industrial tracks to such plants or industries.

(4) Imposing a direct and serious burden upon and unreasonably interfering with interstate commerce.

Wherefore, the appellant prays that said order and decree be reversed and that said District Court for the Northern District of Georgia, Northern Division, be ordered to enter a decree reversing the decision of the lower Court in said cause.

FITZGERALD HALL,
H. C. PEEPLES,
Attorneys for Appellant.

Filed in Clerk's Office Sep. 17, 1921.
O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

46 *Order Allowing Appeal.*

On motion of Henry C. Peeples, Esq., Solicitor and Counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore, on September 12th A. D. 1921, entered and filed herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $250.00.

It is further ordered that the defendants and each of them be restrained, during the pendency of this appeal, from in any manner enforcing the orders of the Railroad Commission of Georgia complained of or any penalties for non-compliance therewith, it appearing that irreparable damages would otherwise accrue to the complainant; this restraining order to become effective upon the filing by the complainant of bond in the sum of $1,000.00 to be approved by the Court, conditioned to pay to the defendants any damages they may sustain from the prosecution of this appeal, should the order and decree appealed from not be reversed.

Sept. 17, 1921.

SAM'L H. SIBLEY,
Judge U. S. District Court.

Filed in Clerk's Office, U. S. District Court, Sep. 17, 1921.
O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy Clerk.

47 *Bond on Appeal.*

Know all men by these presents, that we, Western & Atlantic Railroad, as principal and Royal Indemnity Company of N. Y. as surety, are held and firmly bound unto the Railroad Commission of Georgia, C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, individually and as all the members of said Commission, Albert Collier, individually and as Secretary of said Commission, James B. Hines, individually and as Special Attorney to said Commission, and George M. Napier, individually and as Attorney General of the State of Georgia, in the sum of Two Hundred and Fifty Dollars lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, Jointly and Severally, and each of our successors, by these presents.

Signed and sealed this 19th day of September, 1921.

Whereas the above named Western & Atlantic Railroad, has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree of the United States District Court for the Northern District of Georgia, rendered on September 12th, 1921 in the above entitled cause:

Now, therefore the condition of this obligation is such that if the above named Western & Atlantic Railroad shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

WESTERN & ATLANTIC RAILROAD, [L. S.]
Principal,

By HENRY C. PEEPLES,
Its Attorney at Law.

[SEAL.] ROYAL INDEMNITY COMPANY OF N. Y. [L. S.]
MILTON DARGAN, JR.,
Attorney in Fact.

The within bond is approved. This September 19, 1921.
SAM'L H. SIBLEY,
Judge U. S. District Court.

Filed in Clerk's Office Sep. 19, 1921.
O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

48 *Bond for Restraining Order.*

Know all men by these presents, that we, Western & Atlantic Rail-Railroad, as principal and Royal Indemnity Company of N. Y. as surety, are held and firmly bound unto the Railroad Commission

of Georgia, C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet and James D. Price, individually and as all the members of said Commission, Albert Collier, individually and as Secretary of said Commission, James K. Hines, individually and as Special Attorney to said Commission, and George M. Napier, individually and as Attorney General of the State of Georgia, in the sum of One Thousand Dollars, lawful money of the United States, to be paid to them and their respective executors, *administrations* and successors; to which payment, well and truly to be made, we bind ourselves and each of us, Jointly and Severally, and each of our successors, by these presents.

Signed and sealed this 19th day of September, 1921.

Whereas the above named Western & Atlantic Railroad has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree of the United States District Court for the Northern District of Georgia rendered on September 12th, 1921, in the above entitled cause, and

Whereas an order has been made by the Judge of said Court on September 17th, 1921 in said cause, restraining the defendants therein, hereinabove named as the obligees in this bond, during the pendency of said appeal, from in any manner enforcing the orders of the Railroad Commission of Georgia complained of or any penalties for non-compliance therewith, said restraining order to become effective upon the filing by complainant of bond in the sum of $1,000.00 to be approved by the Court, conditioned to pay to
49 the defendants any damages they may sustain from the prosecution of said appeal, should the order and decree appealed from not be reversed.

Now, therefore, the condition of this obligation is such, that if the above named Western & Atlantic Railroad shall pay to the said defendants any damages they may sustain from the prosecution of said appeal, should the order and decree appealed from not be reversed, then this obligation shall be void; otherwise to remain in full force and effect.

WESTERN & ATLANTIC RAILROAD, [L. S.]
Principal,

By HENRY C. PEEPLES,
Its Attorneys at Law.

[SEAL.] ROYAL INDEMNITY COMPANY OF N. Y., [L. S.]
Surety.

MILTON DARGAN, JR.,
Attorney in Fact.

The above bond is approved. Let it be filed and thereupon the restraining order provided for in the order of this Court of September 17th, 1921 shall become and be effective.

This September 19, 1921.

SAM'L H. SIBLEY,
Judge U. S. District Court.

Filed in Clerk's Office Sep. 19, 1921.
O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

50 In the District Court of the United States for the Northern District of Georgia.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD, Complainant,

vs.

RAILROAD COMMISSION OF GEORGIA et. al., Defendants.

Statement of Evidence to be Included in the Record of the Appeal of Complainant in the Above Cause, Prepared, Approved, and Filed to Conform to Equity Rule 75.

Upon the hearing of said cause the complainant introduced in evidence the following:

Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12 and 16 to the bill of complaint, which have been specified in the precipe herewith filed, to be transmitted as part of the transcript of the record in said cause, and will be so transmitted, which are not of such character as to admit of substantial condensation, and which, hence, need not be set forth herein.

Also, affidavit of W. P. Anderson, Civil Engineer of the complainant, accompanying Exhibit No. 5 to the bill of complaint (the map of the Town of Smyrna), to the effect that he prepared said map and that the same was complete and accurate.

Also, affidavit of the official photographer of complainant, that he personally took the photographs (Exhibits 4, 6, 7, 8, 9, 10, 11 and 12 to the bill of complaint), and that the same were fair and correct.

Also, the record of the proceedings before the Railroad Commission of Georgia in the matter of the application of the Farmer's
51 Warehouse Company, duly verified by the certificate of the Secretary of said Commission, and which, in brief, was as follows:

(1) Petition of the Farmer's Warehouse Company to said Commission of March 15, 1921, stating:

Petitioner, a corporation, secured a tract of land in Smyrna, Ga., on the line of the W. & A. R. R. after having inquired whether a side track of the railroad could be placed for use of petitioner at this point.

Before locating its warehouse building, it made, prior to March 13, 1920, formal application to the W. & A. R. R. and N., C. & St. L.

Ry., through its Superintendent, Baldwin, for the construction of a side track, as shown by letter attached of April 8th, 1920, of the Division Engineer of the railroad.

The company engineers mapped and staked out the line and under their survey petitioner built its warehouse to conform to the survey.

It was informed by said Superintendent, that the only condition on which the side track would be constructed was under the Administration's order from Washington; that the same could not be altered, changed or varied. This petitioner consented to and the railroad engineers were to survey and determine the parts of the cost to be paid by petitioner and the part to be assumed by the railroad company.

After petitioner had constructed its warehouse on lines laid down by the railroad engineers the railroad, by letter of Oct. 7, 1920, (attached) declined to construct the side track unless petitioner agreed to pay the entire cost of the same. Petitioner's business is daily retarded and it is being put to the extra expense of hauling by team, all its carload receipts and shipments. It has been completely cut out of carload cotton seed business and prays that compensation be awarded it for the extra outlay and that the railroad company be required to construct the track as soon as practicable.

52 Attached was letter of the Division Engineer of April 8th, 1920 saying that, as stated in his previous letter of March 13th, it would be necessary for the nearest part of the platform of the warehouse to the track to be a certain distance, stated, from the main track and from the centre of the nearest side track; and that this would allow an additional track to be put in parallel with the side track and 13 feet therefrom and 7 feet 6 inches from the proposed track to the warehouse platform.

That he was attaching sketch showing this, and asked to be advised if this gave all the information desired; if not, he would send a person to Smyrna and set stakes for "you."

Attached, also, was letter of Superintendent Baldwin of the Western & Atlantic Railroad, of Oct. 7th, 1920, stating: He was returning contract and side track application No. W-5, covering track proposed to be constructed for the Farmer's Warehouse Company. "Beg to advise it will be necessary for your company to bear the entire cost of this track. The management has directed that all side tracks be constructed on this basis, and I regret to advise that exceptions cannot be made thereto."

(2) Answer of the Western & Atlantic Railroad to said petition, stating:

Whatever application was made for the construction of the side track before March 13th, 1920 was made while the Western & Atlantic Railroad and the Nashville, Chattanooga & St. Louis Railway were in the hands of and under control of, so far as construction of the track was concerned, the United States Railroad Administration, and any construction of the track during said time could only have been made under and in conformity to the requirements of

53 the Director General of Railroads.

Thereafter, when the matter of the construction of a side track to accom-odate the proposed warehouse was under consideration, respondent submitted to petitioner for execution by it its regular form of contract for such construction, copy of which was attached.

The proposed track would be located entirely on the right of way of the Western & Atlantic Railroad and its location would be such that it would be impossible to serve any other than the petitioner at said warehouse and the same would be necessarily entirely a private side track for the use and benefit alone of petitioner.

It would, therefore, be inequitable, unjust and contrary to law to require respondent at its own expense to put in the track and provide for the care and maintenance of the same to serve said private industry.

As to the relief sought as to reimbursement of petitioner for extra expense, respondent has made no agreement with petitioner. Further, such relief is not within the jurisdiction of the Commission.

Attached to this answer was a copy of the contract submitted by respondent to petitioner, referred to in said answer. So far as is here material to be stated, it provided:

The track not to be more than 305 feet long. The railroad to build the track, furnishing necessary labor and material at an approximate estimate of cost of $2,132.00. Before work began the Warehouse Company to deposit with the railroad, payable to it, certified check for said amount. On thirty days' written notice the railroad to have the right at its discretion to take up and remove all track material from so much of the track as was on its right of way, but so much of the track material so removed as belonged to the industry should be at the disposition of the industry. Should
54 the railroad at any future time construct any additional main or other tracks or revise its grade the industry should pay it the cost of rearranging the track to be constructed under this contract. So much of the track material as was located on the railroad right of way and any renewals thereof paid for by the industry should be and remain the property of the industry, but it should have no control of same except at any time it should have the right to demand its removal and the delivery of same to it by the railroad, the industry to pay cost of such removal and delivery. The track to be maintained and kept in good condition by the industry and if the railroad should deem repairs or renewals necessary, or substitution of heavier material, the industry to pay the actual cost of such material and labor therefor. The industry not to permit the use of the track by or for the benefit of any other party, nor assign the contract, without written consent of the railroad. The industry to keep the track free of obstructions and to hold the railroad harmless from demands of any person on account of any damages or injuries caused by the existence, location or condition of any structures or obstructions of any kind on the premises of the industry, or by any obstructions on the track.

The railroad to have the right to use the track, when not to the detriment of the industry. The industry assumes all responsilibity

for and agrees to indemnify the railroad against loss or damage to property of the industry or upon its premises, regardless of railroad negligence, arising from fire caused by locomotives operated by the railroad on said track, or in its vicinity, to serve the industry, except to the premises of the railroad and to rolling stock and to shipments in course of transportation. The industry also to indemnify and hold harmless the railroad for loss, damage or injury from
55 any act or omission of the industry, its employes or agents, to the person or property of the parties to the contract and their employes or of any other person or corporation while on or about the said tracks; and if any claim or liability, other than from fire, should arise from the joint or concurring negligence of both parties to the contract, it should be borne by them equally.

For any default of the industry in any of its agreements, the railroad might terminate the contract on 30 days' written notice. Either party to have the right to terminate the contract at any time by sixty days' written notice to the other of its intention to do so.

(3) The order of the Railroad Commission of Georgia of April 29th, 1921, that the Railroad Company should, within a certain time construct and place in service the spur or industrial track, "upon the terms and conditions provided in General Order No. 15 of the Director General of Railroads during the period of the United States Railroad Administration, to which terms and conditions applicant had agreed and accordingly constructed its said warehouse." Said order is set out in full in the bill of complaint and need not be more fully stated herein.

(4) The petition of the Western & Atlantic Railroad to the Railroad Commission of Georgia for construction of its above stated order and for direction in the premises, as follows:

General Order No. 15 of the United States Railroad Administration provided:

"(*b*) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point."

That part of the track thus described was shown on a plat attached.

56 Said General Order provided, also:

"(*c*) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line."

Such part of the track in the proposed track for the Farmers' Warehouse Company would be as shown on the plat attached and its estimated cost would be $389.22.

On Dec. 5th, 1918, before the Farmers' Warehouse Company made application to the United States Railroad Administration for industrial track to its warehouse, or constructed any building, the United

States Railroad Administration passed and promulgated Supplement No. 1 to General Order No. 15 and provided that said General Order was supplemented as follows:

"1. General Order No. 15 is not to be construed as requiring or authorizing a Federal Manager to enter into a contract on behalf of the Director General to pay for that part of an industry track on the right of way from the switch point to the clearance point where, in the judgment of the Federal Manager, the amount of traffic to be derived by the United States Railroad Administration from the construction of the industry track is not sufficient to justify such expenditure.

In cases where, in the judgment of the Federal Manager, the circumstances justify the construction of an industry track, but the amount of revenue to be derived therefrom by the United States Railroad Administration does not justify the payment by the Director General of the cost of that part of the track on the right of way from the switch point to the clearance point, an agreement may be made, otherwise in accordance with General Order No. 15, but providing for the payment of the entire cost of the track by the shipper with the provision for refund up to, but not exceeding, the cost of the part of the track from the switch point to the clearance point, at the rate of two dollars ($2.00) per car of carload freight yielding road haul revenue delivered on or shipped from the track during Federal Control."

The purpose of this was clearly to amend the original order and relieve the administration from the hardship which would result from a too liberal construction to the industry of the order in all cases and said Supplement became part of said General Order
57 from Dec. 5th, 1918.

Since the passage by the Commission of its said order of April 29th, 1921, there has arisen between the parties a controversy as to what is its proper construction, the Warehouse Company contending that it is that the Railroad should pay the entire cost of construction and maintenance of the whole track. The Railroad Company contends that said order does not so require, but that under General Order No. 15, as it stood at the date of the passage of said order of the Commission, the Railroad Company would have the right to construct the track and at the cost of the Warehouse Company, but would be required to re-imburse the latter for the cost of that portion of the track from the switch point to the clearance point, at the rate of two dollars per car of carload freight yielding road haul revenue, delivered on or shipped from said track, until the cost of the portion of the track from the switch point to the clearance point had been paid by the railroad to the Warehouse Company. The estimated cost of that portion of the track is $877.02.

Acting under its construction of said order of the Commission the Railroad Company presented to the Warehouse Company a proposed contract for the construction of said industrial track, copy of which was attached, and which contained also provisions which are

usually inserted in proposed contracts of the Railroad Company and industries for construction of industrial tracks, which are not in conflict with said order of the Commission.

Under said order the length of the track was to be 305 feet, but since it was passed the Railroad Company and the Warehouse Company have agreed on a shortening of the track to 265 feet, but the latter refused to furnish certified check, or to execute the contract, so long as it contemplated the Warehouse Company bearing any part of the cost.

58 The said proposed contract is just and substantially in accordance, as above explained, with a proper construction of said order of the Commission, and not in conflict therewith.

Prayer was that, after notice and hearing, the former order be construed according to the above stated construction placed upon it by the Railroad Company, that it be held that the proposed contract was a proper one and one which should be executed as preliminary to construction of the track, and that the Warehouse Company be ordered to furnish to the Railroad Company its check for the estimated cost of the track, or such portion thereof as the Commission might hold to be proper.

Attached was a copy of the proposed contract, (which was in form the same as Exhibit 3 to the bill of complaint). It was similar to the copy contract herein above set forth as attached to the answer of the Western & Atlantic Railroad to the petition of the Farmers' Warehouse Company, except in the following particulars.

The length of track provided for was 265 feet. The estimated cost of materials and labor from clearance point to switch point was $877.02 and from clearance point to end of spur $389.22 or a total of $1,266.24. It provided that before work was begun the industry must deposit check payable to the Railroad Company for $1,266.24, and if actual cost exceed that estimate the industry should pay, also, such excess, but if actual cost was less than the amount of the check the Railroad Company should refund the balance.

Also, that the material of so much of the track on the railroad right of way from the switch point to the clearance point for which the Railroad Company had not reimbursed the industry, as thereinafter provided, should be and remain the property of the

59 industry, but the latter should have no control of it except the right, at any time, to demand its removal and delivery to it by the Railroad Company, actual cost of such removal and delivery to be paid by the industry. The industry was to maintain in good condition, at its expense, that part of the track from clearance point to the end, and the Railroad Company that part from switch point to clearance point. The portion of the track from the switch point to the clearance point would be paid for by the industry and the Railroad Company agreed to reimburse the industry for that portion of the track at the rate of two dollars per car of carload freight yielding road haul revenue delivered on or shipped from said track, until the cost of said portion of the track had been paid by the Railroad Company to the industry. The industry would pay for and maintain, and the Railroad Company would own, that

part of the track on the right of way of the railroad from the clearance point to the right of way line, or so much of the track as was on the right of way.

(5) The answer of the Farmer's Warehouse Company as follows:

The issue as decided by the Commission was that the location of the side track being entirely on the right of way of the railroad, the construction of the track at the entire expense of the railroad was justified by the business of the Farmer's Warehouse. The railroad now seeks through the contract to require the Farmers to pay $1,266.00 and a sum yet unknown in addition, if they see fit to assess it. The Farmers are unable to furnish this or any lesser sum for necessities of life and ought not to be required to supply money to provide tracks necessary for the railroad to properly serve the public. They seek to nullify the order of the Commission by contract giving the railroad the right to take up the side track in thirty
60 days, thus confiscating the labor cost and also the material returned, as it would be of no value to the Warehouse Company in the conduct of its business. The right of the railroad Company to require acceptance of any of the clauses of the contract as submitted by it is denied, as the Commission in the determination of the original issue did not intend that the Warehouse Company should pay for any part of the side track. That the Railroad Company had no right under the Administration's order to require the contract now proposed, is evidenced by the statement of its Superintendent, Baldwin, when negotiations were first conducted, who, when asked if the track could be constructed, if the Warehouse Company would advance the funds of its cost (as it was then in a position to do) to be repaid on each car, replied: "No, the only condition is as laid down by the Administration—the private industry must pay for all the track on its land and the railroad will pay for all on its right of way."

As it is unusual in side track construction, this spur leads off from a side track already constructed, and probably he thought the major cost would have been on the Warehouse Company, though at that time the railroad engineer had staked and mapped it out. The proposed contract requires the Warehouse Company to assume damages for neglect of servants of the railroad and also damages to trespassers on the railroad property without right of defence.

(6) Notification, dated July 14th, 1921, by the Railroad Commission of Georgia to the Western & Atlantic Railroad that the Commission construed its order of April 29th, 1921 as intending that the Western & Atlantic Railroad bear the entire cost of the construction of this industrial spur track, the same to be located on the right of way of said railroad; and extending, for 60 days, the time limit within which the track was to be completed.

61 Complainant introduced, also, the affidavit of W. P. Bruce, as follows:

He is General Manager of the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad, the latter operated as

part of the system of the former, is the operating head of the two roads, having personally performed every character of service in operating work. Has read the bill of complaint in this cause and the statements of fact therein are true, save those made on information, which he believes to be true. Is thoroughly familiar with the situation at Smyrna and the traffic needs there. The present station facilities for handling freight are a freight wareroom containing 900 square feet of floor space and a house and team track sufficient to hold 16 cars. Arrangements have been made to switch this track with road engines twice a day where there is business to be handled. The patrons of the complainant, including the Farmers' Warehouse Company, have abundant, adequate trackage and depot facilities not only to take care of the present business but of any probable increase there. An additional side track would be reproducing physical facilities already adequate to take care of all the present business. The railroad line from Atlanta to Chattanooga is largely single track, the traffic is very heavy and the problem of keeping trains moving promptly is serious and difficult. Its fast freight and passenger trains from Chicago and beyond to Atlanta pass over this track and any delay in the handling of present trains is an actual burden in the operation of its interstate trains. It does not have, because the business does not justify it, a switch engine at Smyrna, and if the private siding were constructed in accordance with the order of the Railroad Commission of Georgia it would have to delay its freight trains so that the road engines could switch this additional
62 track, thereby delaying to that extent the prompt movement of trains. In fact if all the industries in towns along the Western & Atlantic Railroad which handle as much business as the Farmers' Warehouse Company should move to the right of way and demand private facilities, the switching required would prove an impossible burden to the operation of the railroad and require switch engines each of which would entail an additional expense of over $40.00 per day, without earning any additional revenue for the carrier.

Neither the size nor nature of the business of the Farmers' Warehouse Company justify from a traffic and operating standpoint treatment different from that of many other patrons of the road at Smyrna and elsewhere. This track if constructed, on account of the plan for construction, could never be used by others, would be an accom-odation pure and simple for one patron, adding nothing to the earning power of the railroad, increasing its income nothing but considerably increasing its expense. There exists no traffic or operating reasons why this particular small shipper, a new concern of uncertain life, should be preferred over many others by having built for it at the carrier's sole expense a private siding which its business does not justify.

It is not customary for these two railroad companies of which he is General Manager to make in Georgia, or elsewhere, a switching charge for delivery of a car, on which they have all or a portion of the line haul, to such an industrial track as is contemplated in the

order of the Railroad Commission in this case, and deponent's information is that the custom of these two roads is in substantial accord with the general practice of the railroads in this country. It has always been considered a questionable policy to make such a charge because it would tend to keep industries off the railroad line. Of course the Western & Atlantic Railroad would not make
63 such a charge against the Farmer's Warehouse Company at Smyrna, without making similar charges against all others receiving similar switching service in Georgia, and it makes no such charges at this time.

Also the affidavit of H. H. Trabue, as follows:

He is Real Estate Agent and Assistant to the General Manager of the Western & Atlantic Railroad and Nashville, Chattanooga & St. Louis Railway. Is personally familiar with the situation as outlined in the bill of complaint, which he has carefully read, and the same is correct save in the few instances where statements are made upon information, which he believes to be true. He has had general supervision of the side track contracts and the terms and conditions under which they were installed and maintained. In the early days there was no uniformity of action under which industrial tracks were constructed. Anxiety of carriers to have industries located on their lines was in part responsible for this failure to have a fixed standard policy affecting all alike. The first standard contract of the above mentioned railroads was adopted in 1903. This form was revised from time to time and as the Federal laws and rules of the Interstate Commerce Commission became stricter with reference to according like service to all, efforts were made to fix a more definite policy to be applied to all cases covering construction of new tracks. Progress along this line was made when the war broke out and the Government took over the railroads. Thereafter General Order No. 15 and the supplements thereto, exhibits to the bill of complaint, were promulgated by the Director General. At the end of Government Control said two railroads determined to continue in effect the orders of the United States Railroad Administration in connection with the construction of industrial tracks, and he is advised
64 that other roads in the Southeast have done likewise. Since General Order No. 15 was issued said two railroads have executed 98 contracts covering construction, operation and maintenance of industrial sidings: in 9 of these the carriers participated in cost of construction of certain parts of the track as provided by General Order No. 15 before it was amended; in 2 cases it was agreed to refund the cost of certain parts of the tracks at the rate of $2.00 per car as provided by General Order No 15; in 13 cases covering operation and maintenance of old tracks not already covered by contract the industries were not required to pay for the tracks but they agreed to the liability clauses and to assume the cost of maintenance; in all other cases the industries accepted the liability clauses and agreed to pay for the entire cost of construction and maintenance of the track.

About June 12th, 1920, there was filed with the Interstate Com-

merce Commission the case of the National Industrial Traffic League, complainant, versus The Abilene & Rockfish Railway Company et al. As shown by the published opinion, the principal object of this proceeding, which embraced practically all the carriers in this country, was to have fixed and determined a reasonable side track contract which would have more or less universal application and thereby prevent discrimination. The Interstate Commerce Commission, in its opinion of March 15th, 1921, concluded it had no jurisdiction to determine the terms of such a universal contract. However, most of the principal carriers, as deponent is advised, and certainly the two companies which he represents, agreed with the complainants in that case that many provisions, particularly the fire indemnity clauses, should have universal application, it being understood of course that there were some provisions which could not be standardized on account of the varying conditions throughout this country and
65 even over some large systems. Therefore, the present side track contract which is an exhibit to the bill, is the result of years of effort, study and co-operation with shippers, other carriers and the Interstate Commerce Commission to obtain a policy which would be fair and reasonable to all parties. Said standard form is now of universal application on the Western & Atlantic Railroad and Nashville, Chattanooga & St. Louis Railway for all shippers under like conditions doing interstate and intr-state business in Kentucky, Alabama, Georgia and Tennessee, and as circumstances permit those two railroads are revising existing contracts in line with its standard policy, so that all industries on its system shall be treated alike, none discriminated against and none preferred.

Deponent is familiar with the local situation at Smyrna, Ga., and there exists no condition there which would justify the Railroad Company in departing from its standard policy so as to prefer the Farmer's Warehouse Company, and the order of the Georgia Railroad Commission, if obeyed, would compel the Railroad Company to depart from the standard treatment of shippers and unduly and unjustifiably prefer the Farmer's Warehouse Company.

Complainant introduced, also, the affidavit of J. A. Baldwin, as follows:

He is Superintendent of the Western & Atlantic Railroad, having direct charge of the operations of that road, which runs between Chattanooga, Tennessee, and Atlanta, Georgia, and is a part of the system of the Nashville, Chattanooga & St. Louis Railway. Has carefully read the bill of complaint and knows of his own knowledge the facts therein stated are true and accurate, save the statements on information therein, which he believes to be true. The Farmer's Warehouse Company is an incorporation of less than two
66 years' duration. It has a one story building almost opposite the railroad depot at Smyrna, Georgia, said building being 30 by 60 feet with shed adjoining, constructed of plain frame with galvanized iron sides and composite roofing, was completed in April 1920; He does not know the actual expenditure, but from his familiarity with building costs, would say that it cost in the neigh-

borhood of $1,000.00. There are only two men regularly employed at the warehouse. The business done by said Warehouse Company at Smyrna has been very small. Complainant does not know how long the Farmer's Warehouse Company will remain in business; has no assurance that it will remain any particular time and it has made no promises as to the amount of traffic it will produce. The existing facilities, including team track and warehouse, furnished by the Western & Atlantic Railroad at Smyrna fully and adequately accomodate all patrons of the road, including the Farmer's Warehouse Company, and are sufficient size and so located as to take care of material increase in business. The Farmer's Warehouse Company is located almost directly opposite the railroad depot which is across the tracks, and a good road, usable in all sorts of weather, connects the same with said depot and it can use the existing facilities furnished by the Railroad Company as well and as cheaply, if not better and more cheaply, than any person or industry at or near Smyrna.

There is no traffic need for the new spur track which said Warehouse Company seeks to have the Railroad Company build at the entire cost of the latter. It would add nothing to the railroad revenues, actual or potential, would not increase its earning power and would not form a part of the railroad's general transportation system. There are no other industries to use this proposed private siding, but if there were, on account of the manner in which it is
67 sought to have the same constructed, no others could use it. It would simply be a private industrial siding for the sole convenience and benefit of the Farmer's Warehouse Company.

No switch engine is kept at Smyrna because being a small town of about 791 people by the 1920 census, there is not sufficient traffic to justify the expense. If the side track were constructed as ordered by the Georgia Railroad Commission, road engines of complainant's trains handling interstate and intra-state commerce would have to leave their trains and switch cars to and from said private siding, thereby delaying the movement of such trains and increasing railroad operating expenses.

Complainant now handles the business of the Farmers' Warehouse Company in the same manner as it handles business of other patrons at Smyrna and at other stations of the general size and characteristics of Smyrna. There is nothing either in the amount or character of business of the Farmers' Warehouse Company justifying or making necessary treatment different from that accorded other patrons of the road.

The standard form of contract with the blanks filled in to take care of the peculiar conditions at Smyrna is attached to the bill as Exhibit No. 3. This is an exact copy of the contract which the Western & Atlantic Railroad proposed to enter into and submitted to the Farmer's Warehouse Company for execution, but the latter refused to execute it and refused to pay anything either for maintenance or construction of this private siding.

Complainant introduced, also, the affidavit of A. P. Ottarson, Comptroller of the Western & Atlantic Railroad and the Nashville,

Chattanooga & St. Louis Railway, verifying as complete and accurate, statements attached to said affidavit, (Exhibits 13 and
68 15 to the bill of complaint).

These statements were:

A. Statement of revenue accruing to the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad on business transacted at Smyrna, Georgia, for six months ending June 30, 1921.

Briefly stated, this showed receipts from freight forwarded in carload lots $366.05, in less than carload lots $54.70; freight received in carload lots $4,767.37; miscellaneous $141.75; ticket sales $224.44,—making a total of $5,554.32.

B. Statement of business forwarded and received by the Farmers' Warehouse Company at Smyrna, Georgia for six months ending June 30th, 1921, N. C. & St. L. and W. & A. Earnings.

This showed a total revenue of $392.67.

C. Statement of tonnage and revenue of said two railroads on business moving in and out of the Farmers' Warehouse Company plant at Smyrna, Georgia, from May 6th, 1920 to July 31st, 1921.

Briefly stated this showed the following:

Revenue from Freight Received from May 8th, 1920, to April 28th, 1921.

Carload, interstate.....	$342.50		
" , intra-state.....	335.26		
		$677.76	
Less " , interstate.....	89.69		
" " , intra-state.....	48.06		
		127.75	
			$815.51

From April 29th, 1921 to July 31st, 1921.

Carload, interstate,.....	79.20		
" , intra-state.....	56.30		
		135.50	
Less " , interstate	53.11		
" " , intra-state.....	7.27		
		60.38	
			195.88
			$1,011.39

Freight Forwarded from May 8th, 1920, to July 31st, 1921.

Carload	317.05	
Less "	13.70	
		330.75
Total from all Sources.....		$1,342.14

69 There were 27 cars of carload freight inbound and 8 cars outbound. Of these there were 7 carloads of cotton outbound and one of cotton seed, none of potatoes, with total revenue from said cars of cotton and cotton seed of $317.05.

Also, affidavit of said Ottarson, verifying statement (attached to the bill of complaint as Exhibit No. 14) of result of operations of said two railroads for the period from May 1st, 1920, to June 30th, 1921, showing net deficit of $769,757.86.

On behalf of defendants the following testimony was introduced:

Affidavit of Martin F. Amorous, as follows:

70 He is a Director of the Farmers' Warehouse Company of Smyrna, Ga., and is a member of Smyrna Local of the Farmers' Union of Cobb County, Georgia. Said Local has 125 members, most of them being stockholders in the Farmers' Warehouse Company and all of them are patrons and users of the warehouse of said Company at Smyrna. Besides these patrons the warehouse of said Company serves the public of that community generally. Smyrna has a population of 971 by the last United States census and is situated in the midst of a populous community of small farmers who produce chiefly cotton and sweet potatoes. The Farmers' Warehouse Company bought a lot in Smyrna adjoining and abutting on the south the right of way of the Western & Atlantic Railroad, for the purpose of building a warehouse thereon for storing cotton, cotton seed, cotton seed meal and other agricultural products in carload lots, for the purpose of erecting a potato house for storing and curing sweet potatoes which are grown in large quantities in that section and the production of which will be greatly increased by the necessary and proper facilities for their handling in carload lots, and for the further purpose of storing and handling coal and other supplies in carload lots. There are no warehouses in Smyrna on the present *side* and team track of the Western & Atlantic Railroad and there are no other facilities in said town for economical handling of said products in carload lots, which can only be handled profitably from car to warehouse and from warehouse to car. From lack of a warehouse with sidetrack facilities little of this business is now done in Smyrna, but there would be a large volume of this business done if the Western & Atlantic Railroad would build the side track applied for by said Warehouse Company. The business of warehousing cotton, storing and selling cotton seed, cotton seed meal, and storing, curing and shipping sweet potatoes, coal and other similar products, cannot be economically and
71 profitably handled without side track facilities direct to warehouse.

Said Warehouse Company proposes to purchase cotton seed in small quantities, to accumulate the same until carload lots are purchased and then ship in carload lots from its warehouse to the oil mills of the State of Georgia. By this method the farmers of the vicinity will be enabled to realize 2 to 4 dollars per ton more for their

cotton seed. For buying, weighing, storing and loading and shipping such seed said Warehouse Company only realizes $2.00 per ton, which is refunded to the farmers selling the warehouse Company seed less the actual expense of the transaction. If cotton seed have to be stored in warehouse and then drayed from the warehouse to the railroad team track in Smyrna and there loaded in cars the cost will be prohibitive and such business cannot be transacted. To make such business profitable and prosperous the cotton seed will have to be loaded direct from the warehouse to cars on a side track adjacent to such warehouse. The same is true of cotton. If it is stored in the warehouse of said Warehouse Company and then has to be drayed therefrom to cars on the railroad team track at Smyrna and there loaded in cars the business cannot be handled profitably and economically because it can be moved at less cost from the warehouse to the mills in tracks than it can be drayed from the warehouse to said team track and there loaded in cars and shipped to the point of destination. The principal cost of drayage is the cost of labor used in loading and unloading cotton. If cotton can be loaded direct from the warehouse to cars on the proposed side track in front of the warehouse then such cotton can be profitably and economically stored in the warehouse, loaded on cars and shipped to destination by rail.

72 Production, storage and curing of sweet potatoes is beginning to constitute a large industry in Georgia, and the territory around Smyrna is especially adapted to their production; large quantities are now produced there. They cannot be profitably raised and marketed unless cured in houses specially constructed therefor, and cannot be shipped long distances without being first cured. The Farmers Warehouse Company proposes to erect on its land near its cotton warehouse and adjacent to the proposed side track a modern potato house for such curing and storage, which cannot be done without side track facilities. If the potatoes have to be drayed from the curing house to said team track the business cannot be profitably and economically handled. The handling of sweet potatoes is very expensive and side track facilities are absolutely indispensable to their successful handling and marketing.

Deponent lives near Smyrna and is fully acquainted with the condition of the railroad facilities there. There are no warehouses there situated on the present team track of the railroad and it is not practicable to build warehouses adjacent to said team track.

Before the Farmers Warehouse Company had completed its warehouse and during the early stages of its construction, and after the Railroad Company had staked out the lines for said side track, for the purpose of fixing the distance which the warehouse should be built from the center of its main track and from the center of its side track, deponent approached J. A. Baldwin, Superintendent of said Railroad Company, in charge of such work, to ascertain the terms and conditions on which the side track would be constructed, and said Superintendent told him that the Railroad Company would build the side track and bear all the expense of the side track located on its right of way and the Warehouse Company would

bear all the expense of such portion of the side track as
73 would be built on its property. Relying upon this understanding and agreement the Farmers Warehouse Company completed its warehouse.

Also the affidavit of A. L. Crow, to the following effect:

He was Secretary of the Farmers Warehouse Company from its organization until February 1921 and since has been its Treasurer and a Director. Its warehouse was not built until after April 3, 1920, the original warehouse costing $1,500.00 and the addition $700.00. It is the only warehouse in Smyrna, is a public warehouse and is the first bonded warehouse erected in Cobb County, Georgia. Said warehouse company does and proposes to do general warehousing business, storage and selling of farm products, storage of cotton, issuing receipts against the same by which the cotton can be sold or pledged for money borrowed, buying in small quantities cotton seed from wagons of farmers, storing the same until a carload or more is accumulated and shipping same in carload lots to oil mills. The said Warehouse Company can only charge $2.00 per ton for buying, selling and storing cotton seed; if seed has to be drayed from its warehouse to the railroad team track at Smyrna it would be impracticable to transact this business because of drayage expense. The railroad has no facilities in Smyrna by which agricultural or any other products can be located direct from warehouse to cars and cars to warehouse. There is a public demand and necessity for such facilities.

What has been said above as to economical and profitable storage of cotton seed and shipments thereof by rail applies also to cotton. If the Warehouse Company, or its patrons, have to employ trucks to carry the cotton from the warehouse to the team track, in
74 most cases such cotton will be transported to points of destination on the trucks because it is cheaper to do so than pay for drayage and freight by rail.

Smyrna is a business center and the location of said warehouse has drawn business from districts other than the one in which the town is located. It has already produced a large volume of business for the Railroad Company which it would not have shared but for the location of the warehouse and this volume will be largely increased by the installation of the proposed side track. The Warehouse Company has wagon scales for the weighing of farm and other products; the only public scales in Smyrna. These are located right at the proposed side track. This facility attracts business to the Railroad Company and to the town of Smyrna.

Such side track will not only serve the Warehouse Company, but will be a facility used generally by the public and which is now required by the public interests.

Said Warehouse Company is now prevented from handling coal, lumber, ice, sweet potatoes, cotton seed and other products from lack of this side track. Prior to its organization there was practically no market for sale of cotton and no shipments from Smyrna, but since the Company began business in May 1920 450 bales of cotton

have been handled through its warehouse. Of this amount 4 or 5 carloads were shipped over the railroad, which business it would not have gotten but for the existence of the warehouse. If the side track had been built and put in operation most of this cotton would have been shipped by rail and not drayed by trucks to destination.

The side track ordered by the Railroad Commission of Georgia when constructed is to be located entirely on the right of way
75 of the railroad, and is to be part and parcel of its railway. It will be in no sense a private side track, but one for the service of the public at large in that vicinity. Smyrna is in a populous district, the rural section being composed of small and productive farms the proper outlet for which is Smyrna, but before the organization of the Warehouse Company products of these farms moved to other markets, and largely by means of transportation other than by railroad.

Before building this warehouse the Warehouse Company applied to the Railroad Company to know if it would build a side track adjacent to the warehouse as built and Baldwin, the railroad Superintendent in charge of such matters, undertook and agreed to build the side track if the warehouse was built, the terms and conditions upon which it was to be built were left in the hands of Martin Amorous as representative of the Warehouse Company. Said Warehouse Company has originated and given the complainant a large volume of business from which it has received large revenues and the Warehouse Company and the public at large will greatly increase the volume of such business and the railroad revenue if the said side track is built. If it is built the Warehouse Company proposes to erect a house for the curing and storing of sweet potatoes, which is one of the chief agricultural products of that section, there being no public curing house and storage house for potatoes in the County where Smyrna is located. Such curing house cannot be operated successfully without side track facilities, for potatoes must be handled as little as possible, and the expense of draying them from the curing house to the railroad team track will prevent the industry, which industry would add largely to the railroad tonnage if such side track is installed.

It is impracticable to erect warehouses adjacent to the railroad team track at Smyrna. The right of way along the team track is
76 used as a roadway for transportation of freight to and from said track and beyond the right of way the property is all improved and occupied; property cannot be obtained adjacent to the team track for the erection of the warehouse. The facilities now provided by complainant for handling freight in carload lots at Smyrna is not sufficient to meet public demand and necessity and at times the team track is so congested that access to it is denied.

When the said Warehouse Company applied to the Railroad Company to know if it would erect a side track in front of its warehouse if the Warehouse Company erected the Warehouse, the Railroad Company furnished to the Warehouse Company a diagram showing the location of the depot, main track, two center side tracks and the

proposed side track and engineer of the Railroad Company likewise located the line of front wall of the warehouse which the Warehouse Company proposed to build and the platform thereof, locating said platform at a minimum of 20 feet and 6 inches from the center of the already existing side or passing track and 34 feet and 6 inches from the center of the main track and 7 feet and 6 inches from the center of the proposed side track, and entered on the diagram which he furnished to the Warehouse Company showing said proposed locations, the following: "Do not build your platform nearer to the center of the present side track than 20 feet and 6 inches. This is the minimum. You can put it 21 feet and 6 inches if you desire and we can get the track to it alright."

Defendants introduced, also, the affidavit of A. C. Cantrell, to the following effect:

He is a Director of the Farmers Warehouse Company and has been manager of it since Feby. 1, 1921. The population of Smyrna, according to the population of 1920, is 791 and the poulation of the District in which it is located together with the population of
77 the town is 2,196. The warehouse and business done by the Farmers Warehouse Company bring to the town trade from two other Districts, which trade the town did not have before the organization of the warehouse enterprize, and this additional trade and business amounts to $20,000.00 a year, and this has been done without proper railroad facilities. Such facilities would produce from 2 to 5 times as much business. The said Warehouse Company is now prevented from lack of the proposed side track, from doing business in coal, lumber, ice, sweet potatoes, cotton seed and other products. Before the organization of said Company there was practically no market for cotton and no shipments of cotton from Smyrna, but since that time 450 bales were handled through this warehouse, of which 4 or 5 carloads were shipped over the railroad, which would not have happened but for the existence of said warehouse. Much of this cotton was trucked away from said warehouse because of the expense of draying it from the warehouse to the railroad team track, and there loading it into cars. Before the warehouse was built the Warehouse Company applied to the Railroad Company to have the boundary of the adjacent right of way fixed and marked and the Railroad Company sent its engineer to stake the right of way and fix for a location of the front wall of the warehouse next thereto so as to give proper clearance between the center of the main track and the center of the side track to be erected and the front of the warehouse.

The remainder of said affidavit is substantially similar to the affidavit of Martin F. Amorous as to who are the patrons of the warehouse, the purpose of the Warehouse Company in purchasing its lot and erecting the warehouse, the absence of other warehouses and facilities in Smyrna for economical handling of cotton, cotton
78 seed, cotton seed meal, potatoes and other agricultural products in carload lots, as to the fact that from lack of a warehouse

with side track facilities little of such business is now done in Smyrna, but there would be a large volume of it done if the Railroad Company would build said side track. Also as to the intentions of the Warehouse Company as to purchasing cotton seed, accumulating same and shipping it in carload lots, as to what would be realized by the Warehouse Company therefrom, and the fact that such business cannot be profitably and prosperously carried on if seed has to be stored in warehouse and drayed from the warehouse to the railroad team track and there loaded in cars. Also as to the same facts being true with regard to cotton. Also as to what was stated in the affidavit of said Amorous as to production, storage, curing and handling of sweet potatoes. Further, by the method proposed by the Warehouse Company in purchasing cotton seed in small quantities and accumulating it until it can be shipped in carload lots from the warehouse to oil mills farmers will be enabled to realize two to four dollars per ton more for their cotton seed and that there are no warehouses situated on the railroad team track, and it is not practicable to build warehouses adjacent thereto.

79 We agree that the above and foregoing statement of the evidence, in condensed form under Equity Rule No. 75, in the case therein first above stated, is a true and sufficient statement of such evidence, under said rule, and that the same may be approved by the Judge of the United States District Court for the Northern District of Georgia, in conformity to said rule, to be included in the record of the cause on appeal to the Supreme Court of the United States.

This September 30th, 1921.

FITZGERALD HALL,
HENRY C. PEEPLES,
Attys. at Law, for Complainant.
JAMES K. HINES,
Attys. at Law, for Defendants.

The above statement of evidence, under Equity Rule No. 75, having been presented to me and the same having been agreed to by counsel for the respective parties to the cause the same is hereby approved. Let the same be filed and become part of the record for the purpose of the appeal in the cause.

This October 1st, 1921.

SAML. H. SIBLEY,
U. S. District Judge.

Filed in Clerk's Office, Oct. 1, 1921.

O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy Clerk.

80 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD, Complainant,

vs.

RAILROAD COMMISSION OF GEORGIA et al., Defendants.

Precipe for Transcript of Record.

To O. C. Fuller, clerk of the District Court of the United States for the Northern District of Georgia, Northern Division:

Please prepare forwith a certified transcript of the record in the above entitled cause for the appeal of complainant from the order and decree of the Court, in the above mentioned cause, made and entered September 12th, 1921, which record is to consist of the following:

1. The verified bill of complaint, with the affidavit attached thereto of W. R. Cole, President of the complainant, together with Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, and 16, to said bill of complaint.

2. Acknowledgment of service and waiver of further service by counsel for defendants.

3. Order of Hon. S. H. Sibley Judge of said Court of August 22nd, 1921, setting the cause for hearing.

4. Notices to Hon. T. W. Hardwick, Governor of the State of Georgia, and Hon. Geo. M. Napier, Attorney General of the State of Georgia.

5. The motion of the defendants to dismiss the bill of complaint.

6. The answer of the defendants.

81 7. The order and decree in said cause rendered and filed September 12th, 1921, and the opinion of the Court filed therewith.

8. The petition of complainant for allowance of appeal from the last mentioned order and decree and the order of the Court allowing the same and the assignment of errors filed therewith.

9. The citation on appeal and the acknowledgment of service thereof.

10. The appeal bond and the bond for restraining order pending the appeal.

11. This precipe and the acknowledgment by defendants' counsel of receipt of copy thereof and written agreement that it indicates and includes all the portions of the record necessary to be incorporated into the transcript of complainant's appeal.

12. The evidence to be included in the record as prepared and stated by appellant or its counsel, lodged in your office at the time of filing the precipe, under Equity Rule No. 75 (*b*), together with the agreement of counsel and the approval of the Judge of said Court thereon.

FITZGERALD HALL,
HENRY C. PEEPLES,
Attorneys for Complainant.

The defendants hereby acknowledge the receipt of a copy of the foregoing precipe, and agree that it indicates and includes all the portions of the record necessary to be incorporated into the transcript of complainant's appeal therein referred to.
This September 30th, 1921.

JAMES K. HINES,
Attorney for Defendants.

Filed in Clerk's Office, Oct. 1, 1921.
O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy Clerk.

82 In the District Court of the United States for the Northern District of Georgia, Northern Division.

In Equity.

No. 171.

WESTERN & ATLANTIC RAILROAD, Complainant,

vs.

RAILROAD COMMISSION OF GEORGIA et al., Defendants

Citation on Appeal.

To the Railroad Commission of Georgia, C. M. Candler, Paul B. Trammell, James A. Perry, John T. Boifeuillet, and James D. Price, individually and as all the members of said Commission; Albert Collier, individualy and as Secretary of said Commission; James K. Hines, individually and as Special Attorney to said Commission, and George M. Napier, individually and as Attorney General of the State of Georgia, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, in the

District of Columbia, within thirty days from the date hereof, pursuant to an order allowing appeal filed and entered in the office of the Clerk of the District Court of the United States for the Northern District of Georgia, Northern Division, from the order and decree of said Court signed, filed and entered on the 12th day of September 1921, in that certain suit, being in Equity No. 171 wherein the Western & Atlantic Railroad is Complainant and appellant and you are defendants and appellees, to show cause, if any there be, why the order and decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Samuel H. Sibley, Judge, United
83 States District Court for the Northern District of Georgia, this the 17th day of September A. D. 1921.

SAMUEL H. SIBLEY,
U. S. District Judge for the Northern District of Georgia.

(E. J., 652.)

84 [Endorsed:] Appeal No. 87. No. 171. In Equity. U. S. Dist. Court, Nor. Dist. of Georgia, Northern Division. Western & Atlantic Railroad, Complainant, vs. Railroad Com. of Georgia et al., Defendants. Citation on Appeal. Filed in Clerk's Office Sept. 17th, 1921. O. C. Fuller, Clerk United States District Court, Northern District of Georgia. Tye, Peeples & Tye, Division Counsel, Nashville, Chattanooga & St. Louis Ry., Western & Atlantic Railroad, 417 Trust Company of Georgia Bldg., Atlanta, Georgia.

Due and legal service of the within citation is hereby acknowledged. Copy received. Further service and notice waived. Copy petition for appeal, order allowing appeal and assignments of error also received and accepted. This Sept. 17, 1921.

JAMES K. HINES,
Attorney for Defendants.

(E. J., 652.)

85 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Georgia:

I, Olin C. Fuller, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 84 pages of printing and writing contains a true copy of the record, assignments of error, and all proceedings in the case of The Western & Atlantic Railroad versus The Railroad Commission of Georgia, et al., being No. 171 In Equity and No. 87 Appeals, as specified in the Precipe of Counsel therein as fully as the same remains of record and on file in my office at Atlanta, Georgia, except that the original Citation with acknowledgement of service thereon is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court, at Atlanta, Georgia, this the 10th day of October, A. D., 1921.

[Seal of the U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Endorsed on cover: File No. 28,541. N. Georgia D. C. U. S. Term No. 586. The Western & Atlantic Railroad, appellant, vs. The Railroad Commission of Georgia, C. M. Candler, Paul B. Trammell, John A. Perry, et al. Filed October 19th, 1921. File No. 28,541.

No. [redacted] 195

OCT 5 1

WM. R. STAN

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

versus

RAILROAD COMMISSION OF GEORGIA, ET AL.,
APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE WESTERN & ATLANTIC RAILROAD.

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October 5, 1922.

McGregor Printing Co., Nashville, Tenn.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

WESTERN & ATLANTIC RAILROAD, Appellant,

versus

RAILROAD COMMISSION OF GEORGIA, ET AL., Appellees.

No. 586.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE WESTERN & ATLANTIC RAILROAD.

May It Please the Honorable Court:

The Western & Atlantic Railroad, an interstate carrier, filed a bill against the Railroad Commission of Georgia and others to enjoin the enforcement of an order of said Commission requiring said Railroad to construct at its sole expense a side or industrial track for the sole use of the Farmers Warehouse Company, of Smyrna, Georgia. The suit was brought under Section 266 of the Judicial Code, and said order was attacked on three separate grounds, to wit:

(a) Because it deprived the Railroad of its prop-

erty without due process of law, contrary to the Fourteenth Amendment.

(b) Because it imposed a direct and serious burden upon and unreasonably interfered with interstate commerce.

(c) Because it compelled the Railroad to unduly prefer the Farmers Warehouse Company, thereby unjustly discriminating against other shippers and industries similarly situated, contrary to Sections 2 and 3 of the Interstate Commerce Act.

An order to show cause was granted. (R., 18.) The case came on to be heard on motion for an interlocutory injunction. After hearing before three judges, an injunction *pendente lite* was refused on the sole ground that "the amount involved is insufficient to give the court jurisdiction." (R., 27.) The Railroad thereupon appealed directly to this Court. (R., 28, 31.)

I.

STATEMENT OF THE CASE.

BILL OF COMPLAINT.

The Western & Atlantic Railroad, extending from Atlanta, Georgia, to Chattanooga, Tennessee, owned by the State of Georgia, is leased for a long period of years to The Nashville, Chattanooga & St. Louis Railway and forms an integral part of its system, composed of twelve hundred and fifty miles of main

line track in the States of Georgia, Alabama, Kentucky, and Tennessee.

The Railroad Commission of Georgia is created and empowered by various acts of the State Legislature, codified in the 1910 Georgia Code as Sections 2615 to 2670, inclusive. The Commission is authorized, among other things, "to prescribe rules with reference to spur tracks and side tracks, with reference to their use and construction, removal or change, with full power to compel service to be furnished to manufacturing plants, warehouses, . . . where practicable and in the judgment of the Commission the business is sufficient to justify and on such terms and conditions as the Commission may prescribe." Every carrier that violates an order of the Railroad Commission is subject to a penalty of as much as *five thousand dollars each day*, and the officers and agents of the corporation are subject to indictment. Sections 2664, 2667-2669 of the Code of Georgia of 1910 are set out in full in the Appendix, page 78, *infra*.

The Farmers Warehouse Company is a Georgia corporation less than two years old, located at Smyrna, Georgia. (R., 3.) It has a small one-story warehouse and shed, sixty by thirty feet, made of plain framing with galvanized iron sides and a composition roof, costing about $1,000.00, just opposite the depot, distant therefrom only sixty feet by air line and three hundred and seventy-five feet

by a public road passable in all sorts of weather. (R., 7-8.)

Smyrna itself is a small town of seven hundred and twenty-one persons, located fifteen miles from Atlanta in an agricultural section. (R., 6-7.) The bill avers:

> "The Western & Atlantic Railroad has at Smyrna, Ga., large, commodious freight facilities, including both team track and warehouse, sufficient to take care not only of all present business of all parties, but any probable increase thereof."
>
> . . . . . .
>
> "At said place the Western & Atlantic Railroad has a main line and passing track and a house or team track located in front of said depot. On this house or team track and at said depot all the carload traffic, inbound and outbound, is now comfortably and properly handled."
>
> . . . . . .
>
> "That the facilities provided by the Western & Atlantic Railroad at Smyrna are entirely adequate to properly take care of all the business, inbound and outbound, at that place, including the business of the Farmers Warehouse Company.
>
> "The Farmers Warehouse Company has and can continue, without any undue inconvenience or cost, to send and receive freight just as all other shippers and consignees at and near Smyrna and as it now does." (R., 7.)
>
> . . . . . .
>
> "Neither the location of the Farmers Warehouse Company nor the nature and extent of its business differentiates its traffic requirements

from other patrons of complainant's road at Smyrna and similar stations along complainant's line. It has no more need for a private siding than many other small shippers at and near Smyrna. As aforesaid, complainant's physical facilities at Smyrna, as now constituted, are thoroughly adequate to properly handle all present business and any normal increase. Said siding, if constructed, by reason of its location and construction, would and could serve only the Farmers Warehouse Company and would add nothing to the actual or potential earning power of your complainant, but, on the contrary, would increase its maintenance and operating expenses without compensation." (R., 8.)

. . . . . .

"That the total revenue from passenger and freight, carload and less than carload, received and forwarded at the town of Smyrna, Ga., for the six months ending June 30, 1921, was only $5,554.32; and of this amount, during the same period, the total business of the Farmers Warehouse Company, in business forwarded and received, was only $392.67." (R., 7.)

During Federal control of railroads the Farmers Warehouse Company opened negotiations with the United States Railroad Administration officials in charge of the Western & Atlantic Railroad for the construction of an industrial track at Smyrna. After the end of Federal control of railroads—the track not having been constructed—the Warehouse Company filed a petition with the Railroad Commission to compel the plaintiff to construct such an industrial siding, and on April 29, 1921, the Com-

mission ordered the Railroad to construct the same "upon the terms and conditions provided in General Order No. 15 of the Director General of Railroads." (R., 3.) Thereupon the Railroad submitted to the Farmers Warehouse Company its standard form of industrial track contract, conforming, as it thought, to the order of the Georgia Commission. Under the terms of this contract as prepared, the initial cost of construction—not including the land used—was to be borne $877.02 by the Railroad and $389.22 by the Farmers Warehouse Company. (R., 6.)

The Farmers Warehouse Company refused to sign the same, so the Railroad asked the Georgia Commission for a construction of its order, and was advised that it, *the Western & Atlantic Railroad, must bear the entire cost of construction.* (R., 3-4, 6.)

The bill proceeds:

> "Your complainant does not keep, and the traffic does not justify the keeping, of a switch engine at Smyrna. In order to operate this private track, if constructed, and deliver and receive cars onto and from the same the road engines of your complainant's trains would have to put cars in and take them out of said track, thereby increasing your complainant's operating expenses and delaying the movements of inter and intrastate freight, interfering also with the prompt and proper movement of traffic over said line, which is largely single track.
>
> "Your complainant, in connection with the Nashville, Chattanooga & St. Louis Railway, operates fast freight and passenger service with its connections from Chicago, and any delays in

the handling of local trains burdens and interferes with such interstate traffic.

"The interest on the money which your complainant would have to invest in said track, if constructed conformably with the order of the Railroad Commission of Georgia, depreciation charges, necessary maintenance and operating expenses, would exceed $200 a year, the amount of excess depending upon the amount of the Farmers Warehouse Company's business. It would unduly, unreasonably and unnecessarily hamper and delay it in the proper operation of its interstate trains, and would impose upon it expenses and costs without any compensation, because the Farmers Warehouse Company would not be required to pay it any additional charges or rates for transportation of freight or for the delivering and receiving thereof on said private siding over and above that paid by other shippers who receive and load their freight on the public team track and at the public depot.

"In other words, if said order of the Georgia Commission be complied with, the Farmers Warehouse Company will receive a valuable service, a service in addition to what others similarly situated receive, and pay nothing therefor; hence your complainant, the Western & Atlantic Railroad, would not add anything to its earnings by reason of the construction, maintenance and operation of said expensive private siding, and hence would be deprived of its property without due process of law." (R., 8-9.)

. . . . . .

"The order of the Railroad Commission of the State of Georgia, if obeyed, would compel your complainant to depart from its fixed, standard policy, which is a reasonable policy, and in general line, as your complainant is informed and believes, with the policy of all standard rail-

roads in the United States, and discriminate against all shippers, interstate and intrastate, in the States of Kentucky, Tennessee, Alabama and Georgia, in favor of the Farmers Warehouse Company alone.

"Further, the refusal of the Farmers Warehouse Company to sign said standard form of contract would impose, if said track be constructed and operated, an additional burden upon your complainant by reason of the risk it would run from setting out fire. It is, and long has been, the fair, reasonable policy of your complainant and The Nashville, Chattanooga & St. Louis Railway, and, as your complainant is informed and believes, of all standard railroads in this country, to require private industries to waive claims for damage resulting from fire incident to the operation and use of industrial sidings. The refusal of the Farmers Warehouse Company to sign such standard contract, therefore, imposes this constant additional danger upon your complainant." (R., 9-10.)

There being no express remedy provided by the Georgia laws to review such an order of the Railroad Commission and plaintiff having no adequate remedy at law, the bill of complaint in this cause was filed. (R., 11.)

In conclusion, it is alleged:

(a) That the proposed track would be a pure private convenience—not a public facility—and the order requiring the plaintiff to construct, maintain and operate it at its sole expense, constituted a taking of plaintiff's property without due process of law contrary to the Fourteenth Amendment.

(b) That even if said proposed track would be a public facility, yet, due to physical conditions, it could not be used by any party or parties save the Farmers Warehouse Company; and inasmuch as existing facilities were thoroughly adequate, the order directing the Railroad to reduplicate at its sole expense already physically adequate facilities deprived the Railroad of its property without due process of law contrary to the Fourteenth Amendment.

(c) That the order, if obeyed, would impose a direct and unreasonable burden upon and would unreasonably interfere with interstate commerce in that switching to and from said siding by road engines would cause serious delay and inconvenience to traffic.

(d) That the order, if obeyed, would compel the Railroad to discriminate against all other shippers everywhere and unduly prefer the Farmers Warehouse Company contrary to Sections 2 and 3 of the Interstate Commerce Act. (R., 10-11.)

The usual form of injunctive relief was prayed.

DEMURRER AND ANSWER.

Both demurrer and answer challenged the jurisdiction of the court on the ground that there was not involved as much as three thousand dollars exclusive of interest and costs. (R., 21, 22.) The answer admitted most of the averments of the bill, but

claimed that the track to be constructed would not be private, but would be a public facility for which there was great need; continuing:

> "Said Farmers Warehouse Company *proposes* to receive and store cotton, cotton seed and other products for its patrons, which it cannot do unless said side track is provided. Farmers and others who wish to store cotton at said warehouse will not do so if the same has to be drayed from the said warehouse to the depot of complainant for shipment. Said Farmers Warehouse Company *proposes* to purchase, store and ship cotton seed from its warehouse over the line of railway of complainant. These cotton seed *will be* bought in wagon load lots or smaller quantities from farmers in the vicinity of Smyrna, and shipped by said Farmers Warehouse Company in carload lots to oil mills in this State. The compensation which said Farmers Warehouse Company would receive from buying, storing and shipping such cotton seed is so small that said company cannot handle them if the same have to be drayed from its warehouse to the depot of complainant, as these respondents are informed and believe. *The margin of profit in said business is so small that it will not justify the draying of said seed from said warehouse to said depot.*" (R., 23.)

It is alleged on information that the Farmers Warehouse Company "*proposes* to erect a public gin" and other facilities, and that the warehouse was built "upon the promise of complainant to furnish it with side track facilities." (R., 24.)

THE EVIDENCE.

The evidence in the case consisted of exhibits to the bill and affidavits read on the application for an interlocutory injunction. The following thus appears:

1. General Order No. 15 and supplements thereto controlled during Federal control the construction and maintenance of industrial sidings. The practice thus begun has been perpetuated by the Railroad. (R., 16-18, 42.)

2. The Farmers Warehouse Company opened negotiations with the United States Railroad Administration, and any promises made were made by the Administration and not by the Western & Atlantic Railroad. (R., 35.)

3. The contract which the Western & Atlantic Railroad prepared and offered to the Farmers Warehouse Company, after the first order of the Georgia Commission, was *its standard form*, conforming to its fixed policy and General Order No. 15 and supplements thereto. (R., 36, 42-44.)

4. The proposed track, although located entirely on the right of way of the Railroad, due to its location, the topography of the surrounding territory and the manner of its construction, would and could serve no industry or individual other than the Farmers Warehouse Company. (R., 36, 44.)

5. The Railroad, in submitting its standard form of contract, offered to furnish the land, but required the Warehouse Company to advance the initial cost of construction, which was $1,266.24, reimbursing it in the sum of $877.02 at the rate of two dollars per car in accordance with the provisions of General Order No. 15 and its supplements. (R., 6, 37-39.)

6. The Railroad's freight wareroom at Smyrna contains nine hundred square feet of floor space, and the public house or team track holds sixteen cars. This track is switched twice each day when there is any business to be handled. The construction of the proposed side track would be *"reproducing physical facilities already adequate to take care of all present business."* (R., 41.)

7. It costs forty dollars a day to maintain a switch engine and crew, and the business at Smyrna does not justify it. Switching is done by road engines, with the consequent delay to the movement of trains.

8. The line from Chattanooga to Atlanta is largely single track, and the traffic is very dense, so that it is a serious and difficult problem to keep trains moving. Switching to and from the Farmers Warehouse Company by road engines would delay and seriously interfere with the orderly and prompt movement of traffic. (R., 41.)

9. "Neither the size nor nature of the business of the Farmers Warehouse Company justify from a traffic and operating standpoint treatment different from that of many other patrons of the road at Smyrna and elsewhere. This track, if constructed, on account of the plan for construction, *could never be used by others*, would be an accommodation pure and simple for one patron, adding nothing to the earning power of the railroad, increasing its income nothing, but considerably increasing its expense. *There exists no traffic or operating reasons why this particular small shipper, a new concern of uncertain life, should be preferred over many others by having built for it at the carrier's sole expense a private siding which its business does not justify.*" (R., 41.)

. . . . . .

"In fact, if all the industries in towns along the Western & Atlantic Railroad which handle as much business as the Farmers Warehouse Company should move to the right of way and demand private facilities, the switching required would prove an *impossible burden to the operation of the railroad* and require switch engines each of which would entail an additional expense of over $40.00 per day, without earning any additional revenue for the carrier." (R., 41.)

. . . . . .

"There is *no traffic need* for the new spur track which said Warehouse Company seeks to have the Railroad Company build at the entire cost of the latter. *It would add nothing to the railroad revenues, actual or potential, would not increase its earning power and would not form a part of the railroad's general transportation system.* There are no other industries to use this proposed private siding, but if there were, *on account of the manner in which it is sought*

to have the same constructed, no others could use it. It would simply be a private industrial siding for the sole convenience and benefit of the Farmers Warehouse Company." (R., 44.)

. . . . . .

"Complainant now handles the business of the Farmers Warehouse Company in the same manner as it handles business of other patrons at Smyrna and at other stations of the general size and characteristics of Smyrna. There is nothing either in the amount or character of business of the Farmers Warehouse Company justifying or making necessary treatment different from that accorded other patrons of the road." (R., 44.)

10. During the six months ending June 30, 1921, the Western & Atlantic Railroad and its lessee, The Nashville, Chattanooga & St. Louis Railway, received only $392.67 from all business to and from the Farmers Warehouse Company.

From May 8, 1920, to July 31, 1921, the total revenues thus received was $1,342.14, less than one hundred dollars per month gross—not net. During this period plaintiff and The Nashville, Chattanooga & St. Louis Railway were operating at a loss. (R., 45-6.) During this entire period only thirty-five carloads were received and forwarded—*an average of one car every twelve days.* (R., 46.)

11. The public team track will accommodate sixteen cars at once. Yet the business at Smyrna is so small that the total revenue on all business, freight and passenger, inbound and outbound, carload and less

than carload, amounts to only $5,554.32 for the six months ending June 30, 1921—less than $1,000.00 per month. (R., 41, 45.)

12. The Farmers Warehouse Company is not two years old, and *"there are only two men regularly employed at the warehouse."* (R., 43-44.)

13. The present standard form of industrial track contract is the result of twenty-five years' labor, litigation and legislation and is fair and reasonable. It is of universal application on the line of the Western & Atlantic Railroad and The Nashville, Chattanooga & St. Louis Railway, and substantially similar—particularly the fire indemnity clause—to those in general use everywhere. (R., 42-3.)

14. "There exists no condition there which would justify the Railroad Company *in departing from its standard policy* so as to prefer the Farmers Warehouse Company, and the order of the Georgia Railroad Commission, if obeyed, would compel the Railroad Company to depart from the standard treatment of shippers and unduly and unjustifiably prefer the Farmers Warehouse Company." (R., 43.)

15. The Farmers Warehouse Company operates on a narrow margin of profit, and *to make the business profitable the construction, operation and maintenance of this industrial track at the Railroad's sole expense is essential.* (R., 47-50.)

16. The Farmers Warehouse Company "*proposes*" to make certain extensions and improvements, but just what will be done and when is not shown. (R., 46-50.)

17. "Its warehouse was not built until after April 3, 1920, the original warehouse costing $1,500.00 and the addition $700.00. It is the only warehouse in Smyrna, is a public warehouse and is the first bonded warehouse erected in Cobb County, Georgia. Said warehouse company does and *proposes* to do general warehousing business, storage and selling of farm products, storage of cotton, issuing receipts against the same by which the cotton can be sold or pledged for money borrowed, buying in small quantities cotton seed from wagons of farmers, storing the same until a carload or more is accumulated and shipping same in carload lots to oil mills. The said Warehouse Company can only charge $2.00 per ton for buying, selling and storing cotton seed; if seed has to be drayed from its warehouse to the railroad team track at Smyrna, it would be impracticable to transact this business because of drayage expense. The railroad has no facilities in Smyrna by which agricultural or any other products can be loaded direct from warehouse to cars and cars to warehouse. There is a public demand and necessity for such facilities." (R., 48.)

18. Substantially all these facts were presented to the Railroad Commission at the hearing before it. (R., 34-40.)

19. Neither the town of Smyrna nor any of its representatives are complaining. The only evidence

of a demand for this track was that of officials of the beneficiary, the Farmers Warehouse Company.

PROCEEDINGS IN THE DISTRICT COURT.

An order to show cause was granted. (R., 18.) The cause was then heard, upon notice, before three judges on application for an interlocutory injunction. An injunction *pendente lite* was denied, but the bill was not dismissed. (R., 27.)

The court in its opinion held that in determining the amount involved the value of the land taken should not be considered, because it already belonged to the Railroad and would not be taken away from it; that "the cost of future maintenance is not involved now, because this is an incident of the *future use.* The maintenance cost for some years will be slight, and *if* the business done over the track does not justify its maintenance, *the question of its abandonment will be open then.*" (R., 27.)

In granting an appeal to this Court, the District Court ordered that:

> "The defendants and each of them be restrained, during the pendency of this appeal, from in any manner enforcing the orders of the Railroad Commission of Georgia complained of or any penalties for noncompliance therewith, *it appearing that irreparable damage would otherwise accrue to the complainant;* this restraining order to become effective upon the filing by the complainant of bond in the sum of

$1,000.00, to be approved by the Court, conditioned to pay to the defendants any damages they may sustain from the prosecution of this appeal, should the order and decree appealed from not be reversed." (R., 31.)

II.

SPECIFICATIONS OF ERROR.

1.

The District Court erred in holding that the amount involved, both upon consideration of the pleadings and the evidence, did not exceed three thousand dollars, exclusive of interest and costs, and, therefore, was insufficient to give the court jurisdiction. (R., 29-32.)

2.

The District Court, in refusing an injunction *pendente lite* because of the amount involved, erred in excluding from computation of that amount (a) the value of the land taken, which land as a fact could be used by only one industry; (b) "future maintenance," which was imposed exclusively upon the Railroad by the Georgia Commission as a permanent—not a temporary or experimental—expense, there being no provision in said order for abandonment of the proposed track under any conditions; (c) and the fines and penalties to which the Railroad, its officers and agents, would be subject whether said order was obeyed or disobeyed.

3.

The District Court erred in failing to hold that the order of the Railroad Commission was void because (a) it took plaintiff's property—whether for private or public use—without due process of law, (b) forced it to unduly prefer the Farmers Warehouse Company over all others, thereby unjustly discriminating against all others, and (c) imposed a direct and serious burden upon and unreasonably interfered with interstate commerce.

III.

BRIEF OF ARGUMENT.

(1) JURISDICTION.

The only ground upon which jurisdiction was challenged was that the amount involved did not total, exclusive of interest and costs, three thousand dollars. The undisputed facts as to the amount show the following to be involved:

1. An immediate, out-of-pocket expenditure of $1,266.24, to be borne entirely by the Railroad. (R., 6, 37, 39.)

2. The track will be laid upon land owned by the Railroad, the track being 265 feet long. (R., 39.) The evidence does not show the value of the land taken, but that the order constitutes a *taking* and that the value must be considered and compensated for, is not disputable. *Missouri Pacific Ry. v. Nebraska*, 164 U. S., 403, 417; *Missouri Pacific Ry. v. Nebraska*, 217 U. S., 196, 205; *Oregon R. R. & Nav. Co. v. Fairchild*, 224 U. S., 510, 523; *Great Northern Ry. v. Minnesota*, 238 U. S., 345.

3. The interest on the immediate, out-of-pocket expenditure the Railroad is required to make, depreciation charges, and necessary maintenance and operating expenses *will exceed each year two hundred*

dollars, the amount depending upon the amount of business done by the Warehouse Company, the more business the more loss. *This is a continual future annual charge.* (R., 9.)

4. A switch engine and crew will have to be maintained at an expense of forty dollars per day or there will result the expense and delay of stopping road engines to do switching for the proposed track for the Farmers Warehouse Company. On account of the heavy through traffic on this line this will cause serious delay and inconvenience to interstate commerce. (R., 9, 11, 41.)

5. The refusal to sign the standard form of contract subjects the Railroad to the constant danger of loss from accidents and fire, because the protective and indemnifying provisions will not be in effect. (R., 37.)

6. The Railroad will be subject to charges of unjust discrimination in that if it obeys the order it will furnish the Farmers Warehouse Company transportation at less "net cost" than to others similarly circumstanced, with the consequent penalties. (R., 41, 44.)

7. The violation by the Railroad of the order of the Georgia Commission involves subjecting the Railroad's officials and agents to indictment and the

Company itself *to fines and penalties as high as five thousand dollars per day.* (R., 4-6.)

8. Further, if the Farmers Warehouse Company, a new, untried concern, with little business, can demand and receive a special track and special service at the Railroad's sole expense in order to enable it to do business profitably, others can do the same. The Railroad has a right to be protected against such demands, and from the breaking down of its uniform industrial track policy.

The learned District Court in coming to the conclusion reached must have failed to consider all the evidence. Furthermore, some of this evidence was intentionally not considered, due, we think, to a misconception of the law. It concluded that it could not consider the value of the land taken, because the Railroad *already owned* it and it would be used in the future for railroad purposes; further, the cost of future maintenance could not be considered, "because that is an incident of the *future* use;" and, finally, maintenance and operating expenses were matters for *future* consideration, and if the business did not in the future justify it, "the question of its abandonment would be open *then.*" (R., 26-27.)

It will thus be seen that the court did not consider the inevitable future expense that would of necessity be incurred from the use, maintenance and operation of this track without compensation to the

Railroad; the land taken; the severe penalties that would result from a failure to comply with the Georgia Commission's order; the possible penalties under the Interstate Commerce Act if it did comply with said Commission's order; the right which the Railroad was seeking to have protected—namely, that its fixed and fair policy for the construction, maintenance and operation of industrial sidings should be maintained in accordance with its standard form of contract; the loss and inconvenience that would necessarily follow from the stopping of through trains, separating the locomotives from the trains and with them switching to and from the proposed industrial siding.

We must approach this question with the following principles in mind:

(1) Jurisdiction is to be determined from the averments in a plaintiff's pleading, and unless obviously fraudulent, colorable, untrue or impossible, they must be taken at their face value, regardless of what may thereafter appear in subsequent pleadings or in evidence.

(2) The jurisdictional amount is not determined solely by looking to the past, but the future may and should be looked to and considered.

(3) The amount in dollars and cents in a particular controversy does not control when the object is to protect now and in the future a valuable right.

(a) JURISDICTION IS TO BE DETERMINED FROM PLAINTIFF'S PLEADING ALONE, UNLESS OBVIOUSLY FRAUDULENT, COLORABLE, OR IMPOSSIBLE.

In *Shulthis v. McDougal*, 225 U. S., 561, 569, it was held that the jurisdiction must be determined "from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings."

In *Pacific Electric Ry. v. Los Angeles*, 194 U. S., 112, 118, this Court held that "jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out (citing cases) nor upon the actual sufficiency in the opinion of the court of the facts alleged to justify the relief prayed for."

See also *Smithers v. Smith*, 204 U. S., 637, 642-4.
Wiley v. Sinkler, 179 U. S., 58, 65.
Schunk v. Moline, etc., Co., 147 U. S., 500, 504-5.

The bill distinctly avers that the immediate cost of labor and material is $1,266.24; that the minimum maintenance and operating expense, for which there will be no compensation, is two hundred dollars every year: that land for a track two hundred and sixty-five feet long will be taken; that there must be a switch engine and crew at the cost of forty

dollars per day for every day or else a delay to traffic due to switching cars to and from the proposed industrial siding by the locomotives of passing trains; that the Railroad will be denied the usual and proper protection of an agreement indemnifying against loss by fire or otherwise; that it will be subject to claims and penalties for violation of Sections 2 and 3 of the Interstate Commerce Act, and, *finally*, to enormous penalties, as high as five thousand dollars per day, for violation of the order of the Georgia Commission, as well as indictment for its officials and agents.

Hence, we assert that not only is there no "legal certainty" that the amount involved is less than three thousand dollars, exclusive of interest and costs, but that it is obvious that the case involves a great deal more.

(b) THE FACTS SET OUT IN A BILL OF COMPLAINT MUST CREATE A LEGAL CERTAINTY THAT THE JURISDICTIONAL AMOUNT IS NOT INVOLVED BEFORE JURISDICTION CAN BE DENIED.

A suit cannot be properly dismissed on the ground that the subject-matter is of less value than the jurisdictional amount, unless the facts made to appear on the record create a legal certainty of that conclusion.

Wetmore v. Rymer, 169 U. S., 115, 128.

In *Put-In-Bay Waterworks L. & R. Co. v. Ryan*,

181 U. S., 430, 431, this Court, speaking through Mr. Justice Shiras, said:

> "And it has been several times decided by this Court that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts, when made to appear on the record, create a legal certainty of that conclusion."

(c) THE OBJECT SOUGHT—TO AVOID REDUPLICATION AT THE RAILROAD'S SOLE EXPENSE OF PHYSICALLY ADEQUATE FACILITIES AND TO MAINTAIN ITS UNIFORM INDUSTRIAL TRACK POLICY, THE RIGHT TO BE PROTECTED AGAINST SIMILAR DEMANDS IN THE FUTURE —MUST BE CONSIDERED.

In *Glenwood Light Co. v. Mutual Light Co.*, 239 U. S., 121, complainant sought an injunction to prevent defendant putting its poles and wires near complainant's, rendering the operation difficult, dangerous, etc. The case was appealed under Section 238 of the Judicial Code, the lower court having dismissed it for want of jurisdiction because the amount in controversy did not exceed $3,000.00. The general rule applicable to injunction cases was held to be "that the jurisdictional amount is to be tested by the *value of the object to be gained by the complainant.* The object of the present suit is not only the abatement of the nuisance, but under the prayer for general relief *the prevention of any recurrence* of the like nuisance in the future." (P.

125.) ". . . The relief sought is the protection of that right, now and in the future, and the *value of that protection is determinative of the jurisdiction.*" (P. 126.) (Italics ours.)

In *Hunt v. New York Cotton Exchange*, 205 U. S., 322, 336, a bill was filed by the Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such Exchange until he should have acquired that right in the proper way. In holding the amount involved to be the value to the Exchange of the *right to control the quotations as against all persons*, not the amount paid by defendant to a telegraph company, authorized to distribute them, for furnishing them, this Court said:

> "It is manifest that the injury to the Exchange is not the rate paid by the appellant to the Telegraph Company. The purpose of the suit is to enjoin the appellant from receiving, using or selling, directly or indirectly, the Exchange's quotations or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them either by contract or purchase from the Exchange, or with its consent and approval, from one of the Telegraph Companies authorized to distribute them. In other words, the *object of the suit* is to keep the control of the quotations by the Exchange and its protection from the *competition of bucket shops or the identity of its business with that of bucket shops.* And the right to the quotations was declared, as we said in *Board of Trade v. Christie Grain & Stock Company*, to be property, and the Ex-

change may keep them to itself or communicate them to others. *The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the Exchange determines the jurisdiction, not the rate paid by appellant to the Telegraph Company.* The value of the right was testified to be much greater than $2,000.00. In *Mississippi & Missouri Railroad Company v. Ward*, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is *Board of Trade v. Cella Commission Company*, 145 Fed. Rep., 28. In the latter suit the Chicago Board of Trade obtained a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, *nor is he required to wait until it reaches the jurisdictional amount.*" (Italics ours.)

The jurisdictional amount as averred in a bill to enjoin ticket brokers from dealing in non-transferable reduced rate excursion tickets cannot be deemed colorable and fictitious when considered in connection with averments as to the large number of such tickets issued, the recurring occasion for their issuance, the magnitude of the wrong dealings by the defendants, the cost and risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complainant company, and the operation of the illegal dealing in such tickets upon the company's right to issue them in the future, coupled with the admission in

the answer that defendants had not only in the past dealt in such tickets, but intended to carry on the business as to all future issues. *Bitterman et al. v. L. & N. R. R. Co.*, 207 U. S. 205.

In this case this Court, speaking through Mr. Chief Justice White, said:

> "The substantial character of the jurisdictional averment in the bill is to be tested, *not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected* and the rights of property which the complainant sought to have recognized and enforced." (Italics ours.)
>
> Citing *Hunt v. New York Cotton Exchange, supra.*

In the instant case the right is asserted by the Railroad Commission of Georgia, under said Section 2664 of the Code of Georgia, to which color is lent by the general language of said Georgia statute, to order the installation and maintenance of private industrial tracks. This right is denied by the petition of plaintiff. (R., 2.)

If the right to make such orders is upheld, it would prove "an impossible burden to the operation of the railroad and require switch engines each of which would entail an additional expense of over $40.00 per day, without earning any additional revenue for the carrier." (R., 4.)

Other industries along the railroad right of way and those which could be located thereon could, and in reason would, insist upon construction and maintenance of similar industrial tracks, with as much or more apparent justification than the situation and business of the Farmers Warehouse Company furnishes. If the Railroad's uniform policy can be broken down against its will in the instant case, it can and will be destroyed. *Escape from such burdens and the resulting interference with proper operation the Railroad seeks to effect.* The right to maintain inviolate its uniform industrial track policy and protection against a flood of such demands as made by the Farmers Warehouse Company involves, as a matter of law, an incalculably large amount.

(d) CONSIDERATION OF THE PAST AND PRESENT IS NOT THE LIMIT IN ASCERTAINING THE AMOUNT INVOLVED, BUT THE FUTURE MAY ALSO BE LOOKED TO.

The District Court in the case at bar did not consider what might *hereafter* take place, saying:

> "The cost of future maintenance is not involved now, *because that is an incident of the future use.* The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, *the question of its abandonment will be open then.*" (R., 27.)

In *Berryman v. Whitman College*, 222 U. S., 334, 345, a suit was brought by Whitman College to en-

join the collection of taxes amounting to $946.32 on the theory that its predecessors in corporate interest had a permanent charter exemption from taxes. Jurisdiction was challenged by demurrer on the ground that less than $1,000.00 was involved. In deciding that there was jurisdiction this Court said:

> "This rests upon the proposition that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the *power of taxation* which might be exerted in other taxing districts, or by adding taxes which, *if the right to tax existed, might be assessed, and levied in future years.* This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.
>
> "Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property.
>
> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the *value of the thing in issue, the contract right, exceeded in value the jurisdictional amount.* Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case

where the issue presented is not only the right to collect, *but also to levy all future taxes.*" (Italics ours.)

So in *Glenwood Light Co. v. Mutual Light Co.*, 239 U. S. 121, 125, 126, this Honorable Court said:

"The relief sought is the protection of that right, *now and in the future*, and *the value of that protection is determinative of jurisdiction.*" (Italics ours.)

In *Scott v. Donald*, 165 U. S. 107, 115, this Court held that the plaintiff did not have to postpone his application to a court of equity "until his property to an amount exceeding in value $2,000.00 had been actually seized and confiscated and when a preventive remedy by injunction would be of no avail." In other words, that in determining the jurisdictional amount, future damage might properly be considered in determining present jurisdiction.

See also *Northern Pacific S. S. Co. v. Soley*, 257 U. S. —, 42 S. C. R. 87.

Thompson v. Thompson, 226 U. S. 551.

Bitterman v. L. & N. R. R. Co., 207 U. S. 202, 225-7.

The order of the Railroad Commission of Georgia operates *in futuro and indefinitely.* Why the *constant inevitable expenses* flowing from obedience to that order should have been ignored by the Court, as was done, is not apparent. The District Court

seemed to think that the plaintiff should build the track, suffer the resulting inevitable loss, and that *"the question of its abandonment will be open then."* (R., 27.) To prevent this—abandonment of a track constructed at the Railroad's sole expense—is one of the objects of the injunctive relief sought. If the Railroad must wait until the loss is actually sustained, of what efficacy would an injunction be?

(c) IF THE RAILROAD OBEYS THE GEORGIA COMMISSION'S ORDER, IT WILL VIOLATE SECTIONS 2 AND 3 OF THE INTERSTATE COMMERCE ACT, WITH THE CONSEQUENT PENALTIES. IF IT DISOBEYS SAID ORDER, IT WILL BE SUBJECTED TO HEAVY PENALTIES UNDER THE GEORGIA STATUTES. INJUNCTION IS THE ONLY ADEQUATE REMEDY.

Time was when side tracks were built indiscriminately—without any fixed rule. Some were favored, others were not. To get away from these old and bad conditions the Railroad has struggled for a quarter of a century to bring about a *uniform and fair practice.* This has finally been done. All persons wanting industrial sidings, whether in Kentucky, Alabama, Georgia or Tennessee, are now *treated exactly alike.* (R., 42-43.)

Now the Railroad Commission of Georgia proposes to *compel a change of this fixed and fair policy*—the only legal policy—in order to prefer one little shipper, a new corporation whose future is uncertain. The situation and needs of the Farmers Warehouse Company differ not a bit from the great

mass of shippers. (R., 7, 9, 41-44.) The penalties for common carriers and their officers and agents violating the Interstate Commerce Act are set out in Sections 8 and 10 thereof and in the Elkins Act.

The Farmers Warehouse Company apparently operates on a very narrow margin of profit (R., 23-25, 46-50), and wants this unusual privilege so transportation can be furnished it at less "net cost" than to others. *C. & O. v. Standard Lumber Co.*, 174 Fed. 107.

If the Railroad obeys the Interstate Commerce Act, furnishes service to all at the same cost, prefers none, discriminates against none, then it cannot obey the order of the Georgia Commission. In this event its officers are subject to indictment and it to the enormous penalties of five thousand dollars per day.

The District Court did not consider this situation at all. In such a dilemma the Railroad is entitled to injunctive relief. *Eastern Texas R. R. Co. v. Railroad Commission of Texas*, 242 Federal 300, 304.

In *McNeill v. Southern Ry.*, 202 U. S. 543, there was a controversy between a State Compensation Commission and a common carrier, involving not only the right to enforce against the latter the payment of large statutory penalties, but also the right to carry on interstate commerce in the State without burdensome restrictions and limitations imposed by the Compensation Commission. *The litigation grew*

out of a transaction involving a demurrage claim of about $146.00.

In that case it should be noted that *the penalties had not already been incurred*—that is to say, the order of the Commission was made December 10, 1903, and the bill was filed January 5, 1904, the statute requiring thirty days' notice of the order before failure to comply therewith would result in incurring the penalty.

The particular order of the Commission which was attacked was one requiring the complainant to make delivery of four cars of coal on a spur track extending to the premises of a coal company. The complainant had been accustomed to make such deliveries, but refused to do so, as to the four cars, because of a dispute as to demurrage charges on other cars consigned to the coal company, the amount of this demurrage being $146.00.

The Commission and the coal company contended that the extra cost or expense, if any, of placing the four cars on the spur track, was the matter in controversy. In the lower court it was claimed that the demurrage was the question at issue.

It was said by this Court, speaking through Mr. Justice White:

> "We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the ob-

ject of the bill to enjoin, being based upon the assumed authority of a State Statute, which the bill alleged to be in violation of the rights of the railway company protected by the Constitution of the United States."

In addition to the fact that pecuniary loss immediate and in the future sufficient to bring the instant cause within the jurisdiction of the Court was shown, it can be said of this cause, as it was of the McNeill case, that the plaintiff is endeavoring to avoid what it claims to be an illegal interference with the property and interstate business of the railroad company, based upon the assumed authority of a State statute, which the plaintiff alleged to be in violation of the rights of the railroad company protected by the Constitution of the United States.

The Railroad Commission of Georgia expressly asserts the right, under the Georgia Statute (embodied in Section 2664 of the Code of Georgia), to order the construction and maintenance of a *private* industrial track entirely at the expense of the railroad company. *This appears from its answer to the complaint.* (R., 24.) It appears, also, from the petition to said Commission for an order requiring the putting in of the track and from the order itself (R., 3, 34, 40), the order being set out in full on page 3 of the Record.

The District Court, therefore, erred in not considering the penalties.

It is interesting to note that in none of the cases,

hereafter to be referred to (*Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403; *Hairston v. D. & W. R. Co.*, 208 U. S. 598; *Union Lime Co. v. Chic. & N. W. R. Co.*, 233 U. S. 211; *Lake Erie & W. R. Co. v. State Com. of Illinois*, 249 U. S. 423) does it appear that the pecuniary amount immediately and directly involved was as much as even $2,000.00, and it is fairly inferable it was less.

In the McNeil case, *supra*, it was some $146.00; in *Mo. Pac. v. Nebraska*, 217 U. S. 196, it was $500.00; and in *C. & N. W. R. Co. v. Ochs*, 249 U. S. 416, it was between $1,400.00 and $1,500.00.

While these are physical precedents only, still they show that it was never supposed by counsel or court that in cases of such character the actual initial cost of constructing the track or the like must be in excess of the jurisdictional amount.

No specific remedy is provided by the law of Georgia for redress against an unlawful order of the Railroad Commission—no proceeding at law for review or appeal. A petition in equity, either in the State Court or the United States Court, is the only method to enjoin action for the heavy penalties prescribed and determine whether the Commission's order must be obeyed.

Of course, if the Railroad Company has the right to go into a State Court to urge that its rights under the Fourteenth Amendment are or will be violated, it can go into a court of the United States with the

same complaint upon showing that sufficient value is involved.

St. Louis, I. M. & S. Ry. v. Williams, 251 U. S. 63, 65.

Wadley So. R. Co. v. R. R. Com. of Ga., 235 U. S. 651.

Gulf Col. & S. R. R. Co. v. Texas, 246 U. S. 58.

We submit that the record discloses a "legal certainty" that the amount involved, exclusive of interest and costs, exceeds three thousand dollars.

(2) NO QUESTION—NOT EVEN THE JURISDICTIONAL ONE—WAS FINALLY DECIDED BELOW, BUT APPEAL BEING PERFECTED UNDER SECTION 266 OF THE JUDICIAL CODE, THE ENTIRE CASE IS HERE FOR DECISION.

Where a suit has been decided on a jurisdictional question and appeal is prefected under Section 238 of the Judicial Code, it seems clear that, as a general rule, only the jurisdictional question will be considered here. *Columbus Railway & Power Co. v. Columbus*, 249 U. S. 399, 406.

However, suit was brought below and appeal perfected here under Section 266 of the Judicial Code. The apparent object of this section is to permit cases of this character—an attack upon the constitutionality of a State statute or the order of a State Commission—to be brought to this Court for final decision as speedily as possible. In other words, Congress has, within its powers (Article III, Section 2),

given this Court quasi original jurisdiction of cases involving the acts of a State, whether exercised by legislative, executive or judicial authority, when those acts are challenged as inconsistent with the United States Constitution. In such a case this Court will review the entire case. *Van Dyke v. Geary*, 244 U. S. 39-42.

In the instant case, while an injunction *pendente lite* was denied *after notice and hearing* because the jurisdictional amount was not apparent, *yet a restraining order was granted pending appeal because irreparable injury, for which no adequate remedy at law existed, would otherwise result.* (R., 31.) This was in effect, in all but name only, a determination—as an interlocutory injunction would have been—of the merits. In such a case the action on the application for an interlocutory injunction is "in many respects (be) the equivalent of a final decree." *Louisville & Nashville Railroad v. United States*, 238 U. S. 1, 10. The case now stands, *as a practical matter* (although the restraining order was granted by only one judge), just as if the interlocutory injunction sought had been granted and the Railroad Commission of Georgia had appealed. Hence, the appeal brings here both the jurisdictional and meritorious questions. By analogy the following cases are pertinent:

American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 205-6.
Western Union v. U. S. & M. F. Co., 221 Fed. 545, 553.
Davis v. Hayden, 238 Fed. 737.

So, too, the answer denies but few of the averments of the bill; so, considering the substance of the affidavits introduced to support said answer, it is fairly apparent that *after final hearing the record will be substantially as it now is.*

In *North American Cold Storage Co. v. City of Chicago, et al.*, 211 U. S. 306, the Circuit Court had dismissed the bill for want of jurisdiction alone, and complainant, in addition to procuring the certificate of the Court as to the reason for its action, also appealed from the decree of dismissal directly to this Court, which held that:

> "Such appeal can be heard without resort to the certificate and may be decided on its merits." (P. 314.)

The decree of the Court below was modified by striking out the ground for dismissal of the bill for want of jurisdiction, and, as modified, was affirmed.

And in *Giles v. Harris*, 189 U. S. 475, 486, the Court, speaking through Mr. Justice Holmes, said:

> "Although the certificate relates only to the jurisdiction of the Court as a Court of the United States, yet as the ground of the bill is that the Constitution of Alabama is in contra-

vention of the Constitution of the United States, *the appeal opens the whole case.* . . . The plaintiff had the right to appeal directly to this Court. The certificate was unnecessary to found the jurisdiction of this Court, and could not narrow it. As the case properly is here, we proceed to consider the substance of the complaint." (Italics ours.)

See also *Scott v. Sandford*, 19 Howard 393, 428, 456.

We proceed to the merits of the case.

(3) THE ORDER OF THE GEORGIA COMMISSION IS VOID.

The Farmers Warehouse Company is not an established business, but a new concern of less than two years' life. It has a plant that cost about $2,000.00 and employs only *two men* regularly. During its business life it has handled an average of *one car every twelve days.* The total revenue received by the Railroad from all of its business, inbound and outbound, carload and less than carload, does not equal ninety dollars per month. (R., 8, 45, 46.)

The margin of profit appears to be so narrow that unless the Railroad furnishes service at less "net cost" to it than to others similarly circumstanced, it cannot successfully operate. (R., 23, 47.) It proposes to shift its burden to the Railroad. It seems to labor under the misapprehension that a common carrier should either furnish public warehouses or to

assist those who do undertake such business as that they will make a profit. The Railroad is a carrier, not a warehouseman.

Further, the Warehouse Company "*proposes*" to do several things. Its officials *think* that if the track were constructed, sufficient new business *would hereafter be developed* to justify it. (R., 23-27, 46-50.) It "proposes," but has done nothing and promises to do nothing. "This is merely the language of hope." *Brooks-Scanlon v. R. R. Com.*, 251 U. S. 396, 400.

Its business, from the Railroad's standpoint, is no different from many others at Smyrna and elsewhere. It is, in fact, closer to the depot and team track than any other concern. There is no traffic or operating reason for its having an industrial track constructed, operated and maintained at the sole expense of the Railroad. (R., 9, 41, 44.) *Due to physical conditions, no one else could use the proposed track.* (R., 8, 41, 44.)

It is our position that

(a) The proposed track would be a purely private one; hence, compelling the Railroad to construct, operate and maintain it at its sole expense constitutes a taking of property without due process of law.

(b) The proposed track, even if a public one, is not needed, as there already exist facilities physically

adequate to take care of the Warehouse Company's and all others' business; hence, the order requiring a reduplication of existing adequate facilities transgresses the due process of law clause.

(c) The order directs the doing of that which will burden and interfere with interstate commerce—namely, to stop trains, disconnect the engines and with them switch for the Farmers Warehouse Company. The only alternative is to maintain a switch engine at the cost of forty dollars per day—more than the total revenue from all railroad business, freight and passenger, done at Smyrna.

(d) To construct, operate and maintain this track at the Railroad's expense would be a radical departure from its fixed and fair policy as set out in its standard form of industrial siding contract, hence would unduly prefer one shipper over others, violating Sections 2 and 3 of the Interstate Commerce Act.

(a) THE PROPOSED SIDING WOULD BE A PRIVATE TRACK:

The application to the Railroad Commission of Georgia by the Warehouse Company for construction of a track shows that it was for nothing but a private track. (R., 34-35, 40.) The order of the Commission shows that the track was dealt with as a private track; does not treat it as a public track, but distinctly otherwise; refers to an order of the Director General of Railroads for construction of

private tracks, and contains no recitals as to any public nature of the track whatsoever, but states merely that it appears the construction is practicable and "the business to be done thereon" sufficient to justify the construction thereof and service thereover. (R., 3.)

There is no statutory provision of the State of Georgia making such a track a public track, or giving any person a right to use it, upon contribution to the expense. Indeed, the statute under which the Commission acted does not undertake to make any distinction between public and private side tracks or industrial tracks. (R., 4.) In Georgia there is no law making such track open to use by the public and subject to public control, nor does the statute contain "express provisions whereby it will retain its public character and be open to use by other shippers," as in *Lake Erie & W. Co. v. State Com. of Illinois*, 249 U. S. 422. There is no suggestion, in the Georgia statute, of any difference between private sidings and public sidings.

In point of fact, the location of the track ordered by the Railroad Commission for the benefit of the Warehouse Company is such that nobody but the Warehouse Company can be served by it.

It appears, further, that the Railroad Company offered the Warehouse Company its regular, standard form of contract, used for all patrons under similar circumstances, for putting in industrial tracks,

and the Warehouse Company refused to sign it. (R., 6, 9, 43, 44.) The order of the Railroad Commission ignores it *in toto*, and contains no condition or reservation whatever in favor of the Railroad Company. (R., 3.)

There was no real effort by defendants to show that the proposed industrial track was or could be a public track. None save those interested in the Farmers Warehouse Company appeared or testified.

Their position was that the use of the track would enable the Farmers Warehouse Company to do more business and to transact business more economically, from which alone it was argued that the track was a public track. (R., 23, 24, 25.)

In *Harrold Bros. v. Mayor, etc., of Americus*, 142 Ga. 686, 83 S. E. 534, 536, the Supreme Court of Georgia said:

> "Of course, the construction of a spur track from the main line of a railroad company for the purpose of serving an individual enterprise only is not a public purpose."

In *Railroad Commission v. L. & N. R. R. Co.*, 148 Ga. 442, 96 S. E. 854, 857, the Supreme Court of Georgia, construing Section 2664 of the Georgia Code—the same section involved in the instant case—said:

> "Consequently the section must be construed with reference to this constitutional inhibition; and thus construed, the section empowers the

> commission to require a railroad company to construct spur tracks (1) when such construction is practicable, and the business to be derived by the railroad company shows the order to be reasonable, and (2) when the facts show that such track is a public track and *constructed for the benefit of the public.*"

In the case at bar the *public is not demanding the construction of this track.* The mayor, the city council, representative citizens, did not appear. No body, civic or otherwise, is seeking this track except the one industry that it will serve. No others can use it. It cannot, therefore, be said to be "constructed for the benefit of the public."

Even if the proposed track "would be available incidentally for other things," it still is a private track. *Missouri Pacific v. Nebraska*, 217 U. S. 196, 206-7. In the instant case, however, due to physical conditions, no one else could use it at all. (R., 8, 41, 44.)

Where there is no declaration by the State, legislative or judicial, that spur or industrial tracks are "public" facilities and where there is no demand therefor save by some interested party and where existing facilities are adequate, there is no doubt but that such a track is a private one. *Union Lime Co. v. C. & N. W. Ry. Co.*, 233 U. S. 211, 222.

That the order of the Georgia Commission is void, if the track is a private one, is elemental. *Missouri Pacific v. Nebraska*, 164 U. S. 403, 416-17; *Missouri Pacific v. Nebraska*, 217 U. S. 196.

We submit that the proposed track, although on the Railroad's property, if constructed, would be a private track; hence the order of the Georgia Commission requiring the Railroad to furnish the land, build, operate and maintain the track at its sole expense is void.

(b) THE PROPOSED TRACK, EVEN IF CONSIDERED A PUBLIC FACILITY, IS NOT NEEDED TO ENABLE THE RAILROAD TO PROPERLY PERFORM ITS PUBLIC SERVICE. THE ORDER OF THE GEORGIA COMMISSION REQUIRES THE REDUPLICATION AT THE RAILROAD'S EXPENSE OF ACCOMMODATONS ALREADY PHYSICALLY ADEQUATE.

The order of the Georgia Commission required the Railroad to give up its land and spend its money to build an industrial siding for the Farmers Warehouse Company. This was a "taking of property," whether the track be considered a private or public one. *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 523; *Great Northern Ry. v. Minnesota*, 238 U. S. 345.

It is our position that even if the track be considered a public facility, the order of the Georgia Commission was so arbitrary, unjust and unreasonable—requiring reduplication of accommodations already physically adequate at the Railroad's sole expense—"as to amount to a deprivation of property in violation of the Fourteenth Amendment." *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 524.

A public siding of sixteen car capacity, with two

switches a day, when business justifies, a freight house of nine hundred square feet of floor space, are now furnished by the Railroad at Smyrna. The total business at Smyrna, freight and passenger, carload and less than carload, yields gross—not net—less than one thousand dollars per month. (R., 7, 9, 41, 44-45.)

The Farmers Warehouse Company, a new concern with no established business, with an investment of less than $2,000.00, employing two men at the warehouse, operates on so narrow a margin of profit that, located sixty feet from the public team track, it must have private service to its door *at the Railroad's expense*, else it cannot make money. (*Neither it nor the Georgia Commission considered that the Railroad was not making money.*) And all this for what? *One car every twelve days—three dollars per day gross revenue!* (R., 45-47.)

We content ourselves with the mere citation of certain State cases, except of Georgia, and come directly to the controlling decisions of this Court.

C. R. I. & P. Ry. Co. v. State, 23 Okla. 94, 99 Pac., 901.

St. L. & S. F. R. Co. v. State, 27 Okla. 424.

Railroad Com., et al., v. St. L. S. W. Ry. Co., 35 Texas Civ. App. 52, 98 Tex. 67.

Northern Pacific v. Railroad Com. of Wash., 58 Wash. 364, 28 L. R. A. (N. S.) 1021.

McInnis, et al., v. N. O. & N. E. R. Co., 109 Miss. 482.

The Railroad Commission of Georgia, upon petition by the Roberts Marble Co., and after hearing, ordered the Louisville & Nashville Railroad Company to construct a spur track upon a division—the precise amount not being shown in the report of the case—of the costs. The order was attacked by the Railroad, because, among other grounds, it took its property without due process of law. The same statute, Section 2664, was involved as in the case at bar.

The Supreme Court of Georgia—quoting with approval what clearly appears to be *obiter dicta* from *Union Lime Co. v. R. R. Com.*, 144 Wis. 523, 129 N. W. 605—held:

> "Under this statute the commission is authorized to require railroad companies to build spur tracks and side tracks, within constitutional limitations. *Mo. Pac. Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989. Taking the entire section together, we think the legislative intent in conferring 'authority to prescribe rules' with reference to such tracks includes authority to determine when and under what terms and conditions the same are to be constructed, and this view is consistent with the language immediately following—viz., 'with reference to their use and construction, removal or change.' The Commission would be without power to take private property for private purposes, because this is opposed to the 'elemental conception of individual ownership, and forbidden by the organic law of the State and the United States.' *Harrold v.*

Americus, 142 Ga. 686, 83 S. E. 534, 535. Consequently the section must be construed with reference to this constitutional inhibition; and thus construed, the section empowers the Commission to require a railroad company to construct spur tracks or side tracks (1) when such construction is practicable, and the business to be derived by the railroad company shows the order to be reasonable, and (2) when the facts show that such track is a public track and constructed for the benefit of the public."

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"It was alleged in the petition in the case under consideration that the spur track in question is not for the public benefit, but for the benefit of a private enterprise. This allegation is to be considered in connection with other portions of the petition. The blue-print map attached to the petition and made a part thereof showed the proposed spur track to be wholly on the existing right of way of the railroad company, so located as to run longitudinally by the side of the other tracks of the company and in front of the warehouse of the Roberts Marble Company. When the allegations as to private purposes above mentioned are considered in connection with the map, they amount to a mere conclusion, for the spur track after all will be a part of the company's facilities for serving the general public in the village where located. It could not be a private track, but would, like any other part of the company's line of railroad, be subservient to the public use and subject to the reasonable orders and regulations of the Railroad Commission. So construed, the petition failed to set forth a cause of action, and the court erred in overruling the demurrer.

"The court, with the exception of the writer, having thus reached the conclusion that the pe-

> tition itself shows the proposed track to be a public one and for the benefit of the public, I cannot assent to the view that, as a matter of law, a spur or side track is for the benefit of the public by reason alone of its location upon the railroad right of way. Compare *Mo. Pac. Ry. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989."

The basis of the decision was (a) that the track was a *public one*, and (b) *the business derived by the carrier justified its construction.*

Neither of these conditions obtain in the case at bar. The Railroad, during the life of the Farmers Warehouse Company, has received on an average of only *three dollars per day* on all freight, carload and less than carload, shipped to or by the Warehouse Company. Of this twenty-five per cent was less than carload and would, even if the track were in existence, be handled at the regular freight depot. (R., 45.) If all parties were willing, the track could not, by reason of physical limitations, be used by others. (R., 8, 41, 44.)

MISSOURI PACIFIC v. NEBRASKA, 164 U. S. 403, 414, 416-17.

In the matter of petition of Hollenbeck et al., trading as the Elmwood Farmers' Alliance, to the Nebraska State Board of Transportation, it appeared that the Missouri Pacific Railroad Company had permitted two elevators to be placed upon its right of way at Elmwood, that it had room for another, that

another was necessary for the convenience of shippers, and that it had refused the request of petitioners for permission to locate their elevator on the right of way, which was alleged to be an unjust and unreasonable discrimination against petitioners.

The Board of Transportation ordered that the Railroad Company grant to petitioners the right to erect their elevator upon the railroad right of way, etc. The Railroad Company did not comply with the order, so petition for mandamus was brought against it. In its defense the latter relied upon the Fourteenth Amendment. The Supreme Court of Nebraska found in favor of relators and that mandamus should issue. Writ of error was taken to this Court.

Mr. Justice Gray, speaking for the Court, said:

> "A railroad corporation doubtless holds its station grounds, tracks and right of way as its *private property*, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad v. Richardson*, 91 U. S. 454. But how far the railroad company can be compelled to do so, against its will, is a wholly different question."
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> . . . . . .
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> "The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the peti-

tioners the right to build and maintain a permanent structure upon its right of way.

"The order in question was not, and was not claimed to be, either in the opinion of the court below or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together *for their own benefit.* They do not appear to have been incorporated by the State for any public purpose whatever, or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the Board of Transportation, was only 'for a location, on the right of way at Elmwood Station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms.'

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad, against its will, *to transfer an estate in part of the land which it owns and holds,* under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This court, confining itself to what is neces-

sary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, *a taking of private property of the railroad corporation for the private use of the petitioners.* The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

MISSOURI PACIFIC v. NEBRASKA, 217 U. S. 196.

This case involves the constitutionality of a Nebraska statute requiring railroad companies upon written application to make side track or switch connections with grain elevators. There was no provision for a hearing or for compensation.

The Manley Co-operative Grain Association made such a demand upon the Missouri Pacific, offering, however, "to bear a fair share of the expense of extension." This was refused, and one suit was brought by the State to recover a fine for failure to obey the law, and another, on relation of the Association, to compel obedience by mandamus. In holding the statute unconstitutional, this Court said:

"It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintain-

ing the side tracks required. In the present cases the initial cost is said to be $450.00 in one and $1,732.00 in the other; and to require the company to incur this expense unquestionably does *take its property*, whatever may be the speculations as to the ultimate return for the outlay. *Woodward v. Central Vermont Railway Co.*, 180 Mass. 599, 602, 603. Moreover, a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. Now, it is true that railroads can be required to fulfill the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. *Missouri Pacific Railroad Co. v. Kansas*, 216 U. S. 262. It also is true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads after all are properly protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away.

"Thus it is at least open to question whether a railroad company could be required to deliver cattle at another than its own stock yard at the end of the transit, or cars elsewhere than at its own terminus, without extra charge, if it furnished reasonable accommodations. *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144; *Central Stock Yards Co.*

v. Louisville & Nashville R. R. Co., 192 U. S. 568, 570; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128. So far as we see, a grain elevator stands in no stronger position than a stock yard. If, as intimated, the elevators with which the Missouri Pacific connects charge too much and wrong the farmers, there may be other remedies; but manifestly the apprehension expressed by the Supreme Court of Nebraska, that the company, unless checked, will have power to establish a monopoly, is not to be met merely by building another elevator—the physical limits of that kind of competition are too easily reached. But if we assume that circumstances might make it reasonable to compel a railroad to deliver and receive grain elsewhere than at its own elevators, or those that it had made its own by contract, *the circumstances must be exceptional when it would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the road.*" (Italics ours.)

The Court suggested also, following *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, and other cases, that possibly a railroad could not be compelled to deliver at other than its public depot and tracks, if they were adequate. And they are adequate in the case at bar.

OREGON RAILROAD & N. CO. v. FAIRCHILD, 224 U. S. 510.

A Washington statute authorized its Railroad Commission "after a full hearing . . . to order that additional trackage or sidings be con-

structed . . . and that additional connections be made." Upon complaint and after a hearing, the Commission ordered track connections to be made at two points. This honorable Court, holding that such order was void, said:

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, etc., Ry. v. Chicago*, 166 U. S. 226, 236; *Missouri Pacific Ry. v. Nebraska*, 164 U. S. 403, 416. So that where the taking is under an administrative regulation the defendant must *not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. Chicago, etc., R. R. v. Minnesota*, 134 U. S. 418; *Smyth*

v. Ames, 169 U. S. 466; *Chicago, etc., R. R. v. Tompkins*, 176 U. S. 167, 173."

. . . . . .

"Since the decision in *Wisconsin, etc., R. R. v. Jacobson*, 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, *regardless of the amount of business to be done, or the number of persons who may utilize the connection if built.* The question in each case must be determined in the light of all the facts, and with a just regard to the *advantage to be derived by the public and the expense to be incurred by the carrier.* For while the question of expense must always be considered (*Chicago, etc., R. R. v. Tompkins*, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the *necessity*, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of *expense* is 'an important criteria to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. R. v. North Carolina Commission*, 206 U. S. 1, 27; *Missouri Pacific Ry. v. Kansas*, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the ques-

tion of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts—*the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier.* On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined."

. . . . . .

"Here there is *no evidence of inadequate service, no proof of public complaint or of a public demand,* and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there any evidence whatever as to the volume of freight that would use these tracks or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, whether that expense be $7,500.00, as found by the Commission, or $21,000.00, as claimed by the carrier." (Italics ours.)

So in the case at bar there is no "public demand." The town of Smyrna has not complained. No public official, no committee of citizens, no representatives of the public, complained or appeared at the hearing before the Georgia Commission or the District Court. The only complaint was from the Farmers Warehouse Company, the sole beneficiary of the order—seeking to make the Railroad perform transportation service for it at less "net cost" than for others so it could make money.

The Railroad Commission of Wisconsin ordered the Railway to extend an existing spur track in order to serve the Eden Independent Lime & Stone Company. The Railway did not own the land over which the track was to be built, so sought to condemn it from the owner, the Union Lime Company.

The law required that the industry to be served should pay the entire expense of obtaining the right of way and constructing the track. When so constructed, it was, by decision of the State Supreme Court, a public track.

The Lime Company denied the right of the Railway to condemn on the ground that the track would be a private one.

No question of division of cost or the amount of business was involved.

In sustaining the right to condemn, this Court said:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law 43; *Chicago, etc., R. R. Co. v. Porter*, 43 Minnesota 527; *Ulmer v. Lime Rock R. R. Co.*, 98 Maine 579; *Railway Company v. Petty*, 57 Arkansas, 359; *Dietrich v. Murdock*, 42 Mo. 279; *Bedford Quarries Co. v. Chicago, etc., R. R. Co.*, 175 Ind. 303.
>
> "While common carriers may not be compelled to make *unreasonable outlays* (*Missouri*

Pacific Ry. Co. v. Nebraska, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under *reasonable conditions*, so as to meet the *demands of trade;* and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility, and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the State power."

GREAT NORTHERN RY. v. MINNESOTA, 238 U. S. 344.

The Railroad Commission of Minnesota ordered the Great Northern to construct scales for weighing live stock at certain points, it voluntarily doing this at other points. The order was attacked as being an unconstitutional taking of private property, and this Court so held, saying:

"Manifestly, if the order is enforced, plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.

"The applicable principles were announced in *Oregon Railroad, etc., Co. v. Fairchild*, 224 U. S. 510, 524. A taking of railroad property un-

der administrative regulations must 'be tested by considering whether, in view of all the facts, the taking was *arbitrary* and *unreasonable* or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established, the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—*the mere declaration of a commission is not conclusive. Interstate Commerce Commission v. Louis. & Nash. Railroad*, 227 U. S. 88, 91; *Florida East Coast Line v. United States*, 234 U. S. 167, 185."

. . . . . .

"*The business of a railroad is transportation*, and to supply the public with conveniences not connected therewith is no part of its ordinary duty. The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt and dedicated to same use. Under admitted facts, unless justified by alleged unlawful discrimination, we think this was an arbitrary and unreasonable exercise of power."

. . . . . .

"A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded use of this method to bring about lawful conditions, and therein, we think, was *plainly arbitrary and unreasonable.*" (Italics ours.)

The Railroad and Warehouse Commission of Minnesota ordered the C. & N. W. to extend an existing side track about a quarter of a mile to a brick and tile manufacturing plant.

"The principal controversy before the Commission was as to who should bear the cost of the track"—the sum of $2,300.00. The carrier objected to "*bearing any part.*" The Commission ordered the industry to acquire at its expense the right of way and pay one-third of the construction cost, the carrier two-thirds.

The industry had been in operation *twenty years;* it forwarded and received three hundred cars per year, paying the carrier freight charges of $10,000.00 per annum. It *was then*—did not merely propose—actually enlarging its plant at a cost of $150,000.00. The additional track was necessary to serve the enlarged plant, existing facilities being inadequate.

Under the Minnesota law, such a track was "for public use." In sustaining the order of the State Commission—previously sustained by the State Supreme Court—this Court said:

> "Of course, the *expense* is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be de-

rived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria, we think the order in question is not arbitrary, but reasonable."

How different from the case at bar! A new plant, less than two years old, with an investment of about $2,000.00, furnishing the Railroad one car of freight every twelve days, paying in freight charges about three dollars gross per day, existing facilities being adequate.

LAKE ERIE & WESTERN R. R. CO. v. PUBLIC UTILITIES COMM., 249 U. S. 422.

The Illinois Railroad Commission ordered the Lake Erie & W. R. Co. to restore a track which the Railway voluntarily took up.

For *twenty-five years* this track had served a grain elevator. This burned, and the carrier took up the track over the protest of the owner of the elevator, who proceeded to rebuild on the former location. The Commission ordered it rebuilt at the expense of the carrier.

The carrier had received for years a revenue of $20,000.00 per year from the use of this track. The cost of construction was not shown. Under the law of Illinois it was a "public" track. Obviously this Court could not declare the Commission's order so unreasonable and arbitrary as to be void.

TESTING THE FACTS IN THE CASE AT BAR BY THESE CASES.

Let us test the facts in the case at bar by the rules so announced by this Court.

EXPENSE.—In no case decided by this Court—except possibly *Lake Erie & Western R. R. Co. v. Pub. Util. Com.*, 249 U. S. 422—has the entire expense been imposed upon the carrier. Even in *Railroad Commission of Georgia v. L. & N. R. R. Co.*, 148 Ga. 442, there was a fair division of expense. In the instant case the Railroad offered to furnish the land and ultimately pay about two-thirds of the construction cost by refunding the Warehouse Company at the rate of $2.00 per car, as provided for in General Order No. 15 and supplements thereto. (R., 16-18, 37-39.)

Yet the Georgia Commission ordered the Railroad to furnish the land, build the track, maintain, operate and switch it at its sole expense.

NATURE AND VOLUME OF BUSINESS.—The town of Smyrna is a small village of some seven hundred people. *The entire gross revenue from all the freight and passenger traffic of the town is less than $1,000.00 per month*, the entire gross revenue from the freight traffic of the Farmers Warehouse Company for the year ending July 31, 1921, having been less than $100.00 per month, and for the six months ending June 30, 1921, less than $70.00 per month. The business of the Warehouse Company is not that of an industrial plant, but merely that of a very

small and ordinary village warehouse, which received and forwarded for said six months *less than three carloads a month of carload freight.* The business is not only very small, but the Warehouse Company itself is a new concern, but recently established and affording no assurance to the Railroad Company of continuance, much less of growth. (R., 44-46.)

THE REVENUE TO BE DERIVED.—We have given the figure on the business done *supra.* They refer to gross revenue—not as technically used by the Interstate Commerce Commission, but as total income from the business at Smyrna.

The Warehouse Company "*proposes*" many things, but it makes no enlargements as did the manufacturing plant in the Ochs case *supra.* No others can use this track. There is no reasonable expectation of a business to justify its construction and maintenance. All the rosy pictures painted by interested witnesses are "*merely the language of hope.*"

THE CHARACTER OF THE FACILITY.—Due to physical conditions, no one else can use this track save the Farmers Warehouse Company. (R., 8, 41, 44.) There is no need for it. It will care for no overflow of traffic. There is no evidence that either the Railroad's team track or depot was ever unable to handle the business offered. No such complaint has ever been made. The public is not interested. No party has interested itself save the sole beneficiary. No

witness, except the beneficiaries, were produced to bolster the claim of a public demand.

The Railroad's business is transportation—not that of warehouseman. It is under no obligation to furnish directly or indirectly warehouse facilities.

THE ALLEGED PROMISE TO CONSTRUCT.—Only one other matter need be mentioned. There is suggestion in the order of the Commission that it is seeking to enforce an agreement theretofore made between the Western & Atlantic Railroad and the Farmers Warehouse Company.

We do not see how that can be a matter for consideration in the instant cause, but if it be, we call attention to the following:

(a) The Commission is not a body to which is committed jurisdiction to enforce such agreements. It is not constituted for the purpose of decreeing specific performances.

(b) If it were, what appears to show that specific performance could be decreed? Where is even the allegation of a clear and definite agreement as to the construction of this track? It is said that applicant had agreed to the terms of General Order No. 15 and constructed its warehouse accordingly. Who agreed for the Federal Administration of Railroads? To what did he agree?

(c) The alleged agreement was not made by the

Western & Atlantic Railroad. The matter was *res inter alios acta.*

(d) The Commission did not apply the requirements, either of General Order No. 15 as it originally was or as it was made by amendment, *long before* there was any application or suggestion of an industrial track for the Farmers Warehouse Company. When that application or suggestion was made, no one had the right to make an agreement for the Federal Administration of Railroads other than as provided by General Order No. 15 as amended. No one has ever made such agreement for the Railroad. *It is not even pretended that the Railroad has made such an agreement.*

The Railroad and the Director General of Railroads are and always have been distinct; one is not responsible for the acts or omissions of the other.

Managing officials were "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration."

"The Railway employees were under its direction and were in no way controlled by their former employers."

Missouri Pacific R. Co. v. Ault, 256 U. S. 554.
Western Union v. Poston, 256 U. S. 662.

The Federal Control Act did not impose any liability upon the companies on any cause of action

arising out of the operation of the railroads by the Government, either as to things done or omitted to be done.

(e) No question of estoppel can arise. Not only can the Railroad not be estopped by agreement of the Director General, but there is not a suggestion that the Warehouse Company incurred any expense it would not have incurred but for the loosely alleged agreement, or in any way put itself in a disadvantageous position because thereof.

(c) THE ORDER IMPOSES A DIRECT AND SERIOUS BURDEN UPON AND INTERFERES WITH INTERSTATE COMMERCE.

The order in question was not made in the exercise of the police power. It simply requires a special service for one small industry, whose business, in character and volume, differed not a bit from the general run of small business. (R., 8, 41, 44.)

To obey the order cars must be switched to and from the proposed track. A switch engine would cost forty dollars per day or $1,200.00 per month—over $200.00 more than the total revenue from all business at Smyrna each month. This is out of the question.

The only alternative is to stop regular trains—separate the locomotives and do this switching. The traffic on the road from Atlanta to Chattanooga is very dense. Such a procedure would seriously delay

and interfere with interstate trains. (R., 41, 44.)

This would produce an operating result just the same as would follow an order to stop all trains at small stations where local service is already adequate. In such a case (*Herndon v. Chicago, Rock Island, etc., Ry. Co.*, 218 U. S. 135, 157) this Court said:

> "The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, *a State regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce.*"

If the Farmers Warehouse Company is entitled to a special track with the incident special switching service, a similar result will follow, only worse, as did the Georgia "Blow-Post" law which this Court condemned in *Seaboard Air Line v. Blackwell*, 244 U. S. 312, 315—a case involving the exercise of the police power—saying:

> "That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time re-

quired for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings, among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater—for an average freight train, not less than five minutes."

. . . . . .

"That the law as applied to the train in question is an unreasonable regulation of interstate commerce, and a violation of Paragraph 3, Section 8, Article I, of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it."

. . . . . .

"There is pertinent exposition of these in *Southern Railway Co. v. King*, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the State cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the State could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact."

To the same effect are *Chicago, B. & Q. Ry. v. Wisconsin R. R. Com.*, 237 U. S. 222, 227; *Missouri K. & T. v. Texas*, 245 U. S. 484; and *Southern Ry. v. McNeill*, 202 U. S. 543, 561.

Should the order of the Georgia Commission in this case be sustained, in all human probability others similarly situated will demand the same treatment. Of necessity it will have to be accorded them to avoid discrimination. *Great Northern v. Minnesota*, 238 U. S. 340, 346. This would be worse than a "Blow-Post" statute or stopping all through trains. It would make operation impossible.

It is submitted that the order, if obeyed, would impose an undue burden upon interstate commerce.

(d) OBEDIENCE TO THE ORDER WOULD INVOLVE A RADICAL DEPARTURE FROM THE RAILWAY'S FIXED POLICY, WOULD UNDULY PREFER THE FARMERS WAREHOUSE COMPANY, AND WOULD FURNISH IT TRANSPORTATION SERVICE AT LESS "NET COST" THAN TO OTHERS SIMILARLY CIRCUMSTANCED.

The Railway has evolved a fixed policy, embraced in its standard industrial track contract, for the construction, maintenance and operation of spur tracks and industrial sidings. Fair and uniform provisions, particularly with reference to loss by fire and damage, are embraced therein. All persons in Georgia, Alabama, Kentucky and Tennessee must and do sign these contracts. This contract is the result of years of labor, legislation and litigation *to avoid discrimination.* (R., 42-43.)

Now the Railroad Commission of Georgia proposes to have the Railway furnish the Farmers Warehouse Company such a track without any cost to the industry and without any contract. The Warehouse Company will have goods delivered to its door at the same price others have theirs delivered at the public team track or public depot. The Warehouse Company will thus get transportation at less "net cost" to it than others under substantially similar circumstances and conditions. It is a fact that its business differs none from that of many, many others. (R., 8, 41, 43, 44.)

If the Railroad furnishes such service to the Farmers Warehouse Company, then to avoid unjust discrimination it must do so for all others, under similar conditions. *Great Northern v. Minnesota*, 238 U. S. 340, 346.

In *C. & O. Ry. v. Standard Lumber Co.* 174 Fed. 107, it was held that an agreement made in 1899 the effect of which was to give transportation service at less "net cost" to the Lumber Company than to others similarly situated, constituted an illegal discrimination and was void.

See *Wright v. U. S.*, 167 U. S. 512.

R. R. Com. of Texas v. St. L. S. W. R., 35 Tex. App. 52.

It is not customary to make additional charge for spotting cars on ordinary private spurs (*Lake Ter-*

minal Case, 50 I. C. C. 489, 497, *In Re car spotting charges*, 34 I. C. C. 609); hence to construct and maintain and then operate without any charges to the industry unduly prefers that industry and unduly discriminates against others similarly situated.

In *Iron Ore Rate Cases*, 41 I. C. C. 181, 200, the Interstate Commerce Commission said: "Obviously, it is discriminatory for carriers to place ore shipments for some shippers on private tracks within their plants at the points of unloading, while other shippers are served only at the gates of their plants or at the point of interchange with the industry tracks."

See also *Mitchell Coal & Coke Co. v. P. & R.*, 38 I. C. C. 40, 44.
Carey Refg. Co. v. Director General, 59 I. C. C. 647.

In *Traffic Bureau of St. Louis v. C. B. & Q.*, 14 I. C. C. 317, the Commission said: "A railroad company by granting a privilege which, although *ostensibly open* to the whole public, can, in the nature of things, *only be taken advantage of by certain shippers*, creates a discrimination which may or may not be undue, according to the circumstances in evidence."

See *G. N. P. Co. v. N. Y. C. & H. R.*, 19 I. C. C. 579.
Alan Wood Iron & Steel Co. v. P. R. R., 22 I. C. C. 540, 545.
C. W. & V. Coal Co. v. C. B. & Q., 23 I. C. C. 13.
Westport Stone Co. v. C. C. C. & St. L. Ry., 48 I. C. C. 637.

In *Riddle Coal Mining Co. v. M. P. R. R. Co.*, 62 I. C. C. 259, the Commission said:

> "It is not to be understood from the foregoing that a trackage agreement might not be the means of extending preferential treatment to one shipper to the undue prejudice of another. For instance, if a carrier extends its service by a trackage agreement to one mine on another line, it would be difficult, if not impossible, to justify a refusal to accord similar treatment to another intermediate competing mine located on the track over which it operates under the trackage agreement. Such a case, however, is not presented here. It should also be understood that what we have said with reference to trackage agreements has no reference to switching absorption arrangements. It is well settled that if the carriers absorb switching charges for one shipper, they must do the like for all others similarly situated and entitled to like treatment. Upon this record, however, there is no showing of such similarity in circumstances and conditions at mines in other Illinois fields at which the Burlington absorbs switching charges, and at complainant's mine, as would support a finding that all are entitled to like treatment."

The Georgia Commission is undoing or seeking to undo the good work of a quarter of a century. (R., 42-43.) It is no easy matter to standardize such matters as industrial track contracts. Now that this has at last been done, as should be done, as must be done, the Railroad is confronted with the order of a State tribunal seeking to drive an entering

wedge, with ultimate destruction, into this fixed, fair, now universal practice.

It is submitted that should the Railroad obey the Commission's order it would violate Sections 2 and 3 of the Interstate Commerce Act.

In conclusion, we submit that the Court has jurisdiction and that the Railroad is entitled to the relief sought.

Respectfully submitted,

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TYE, PEEPLES & TYE,
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Of Counsel.

October 5, 1922.

APPENDIX.

Applicable Sections of the Georgia Code of 1910.

Section 2664. The Railroad Commission shall have authority to ascertain the cost of construction and the present value of properties in Georgia owned by said corporations or companies, and to that end may employ necessary experts. Said commission shall have authority to prescribe rules with reference to spur tracks and side tracks, with reference to their use and construction, removal, or change, with full power to compel service to be furnished to manufacturing plants, warehouses, and similar places of business along the line of railroads, where practicable and in the judgment of the commission the business is sufficient to justify, and on such terms and conditions as the commission may prescribe. It shall have power and authority to order and compel the operation of sufficient and proper passenger service when in its judgment inefficient or insufficient service is being rendered the public or any community. It shall have power and authority, when in its judgment practicable and to the interest of the public, to order and compel the making and operation of physical connection between lines of railroad crossing or intersecting each other, or entering

the same incorporated town or city in this State. It shall have authority to fix penalties for neglect on the part of railroad companies to adjust overcharges and loss, or failure to decline to do so, if deemed unjust, in a reasonable time. It shall have power and authority to prescribe rules and penalties covering and requiring the prompt receipt, carriage, and delivery of freight, the prompt furnishing of cars to shippers desiring to ship freight, and shall also be authorized to prescribe rules and penalties for the transfer of cars through yards of connecting roads. Said commission shall have power and authority to order the erection of depots and stations where it deems the same necessary, and to order the appointment and service thereat of depot or station agents. The commission shall also have the power and authority to regulate schedules and compel connections at junction points of competing lines.

Section 2667. Every common carrier, railroad, street railroad, railroad corporation, street railroad corporation, express, telephone, telegraph, dock, wharfage, and terminal company or corporation within the State and other corporations, companies, or persons coming under the provisions of this section, and all officers, agents, and employees of the same, shall obey, observe, and comply with every order made by the commission under authority of law. Any common carrier, railroad, street railroad, railroad corporation, street railroad corporation,

express, telephone, telegraph, dock, wharfage, or terminal company, or corporation, cotton compress company within this State, and other corporations, companies, or persons coming under the provisions of this section, which shall violate any provision of this section or the Acts heretofore passed, or which fails, omits, or neglects to obey, observe, and comply with any order, direction, or requirement of the commission heretofore or hereafter passed, shall forfeit to the State of Georgia a sum not more than five thousand dollars for each and every offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section or any preceding Act, or of any such order, direction, or requirement of the Railroad Commission, shall be a separate and distinct offense, and, in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense. An action for the recovery of such penalty may be brought in the county of the principal office of such corporation or company in this State, or in the county of the State where such violation has occurred and wrong shall be perpetrated, or in any county in this State through which said corporation or company operates, or where the violation consists of an excessive charge for the carriage of freight or passengers, or service rendered, in any county in which said charges are made, or through which it was intended that such passengers or

freight should have been carried, or through which such corporation operates, and shall be brought in the name of the State of Georgia by the direction of the Governor. Any procedure to enforce such penalty shall be triable at the first term of the court at which it is brought, and shall be given precedence over other business by the presiding judge, and the court shall not be adjourned until such proceeding is legally continued or disposed of. The decision in such case may be taken to the Supreme Court as now provided in cases of the grant or refusal of injunctions by injunctions by judges of the superior courts.

Section 2668. Every officer, agent, or employee of any such common carrier, corporation, or company who shall violate, or procures, aids, or abets any violation by any such common carrier or corporation or company, of any provision of this section, or which shall fail to obey, observe, or comply with any order of the commission or any provision of any order of the commission, or who procures, aids, or abets any such common carrier or corporation or company in its failure to obey, observe, and comply with any such order, direction, or provision, shall be guilty of a misdemeanor, and shall be subject to prosecution in any county in Georgia in which said common carrier or corporation or company or officer, agent, or employee violates the provisions of this section or any provision of any order of the commission, or in any county through which said corpo-

ration operates. Any officer, agent, or employee shall also be subject to indictment under the provisions of this section, in any county in which a subordinate agent or employee of the company violates the provisions of this section, by the approval or direction or in consequence of the approval or direction of such officer, agent, or employee; and the agent or employee who locally in any county violates the rules or directions of said commission in pursuance of the direction or authority of his superior officer or agent of said company may be called as a witness, and be compelled to testify, showing the authority by which he acted, and such testimony shall not be used against such subordinate employee or agent, nor shall he thereafter be subject to indictment for said offense.

Section 2669. The penalties prescribed by this section and the procedure to enforce the same are made applicable to any and all violations of the rules, orders, and regulations established by the commission.

WESTERN & ATLANTIC RAILROAD *v.* RAILROAD COMMISSION OF GEORGIA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 195. Argued January 9, 1923.—Decided February 19, 1923.

1. An order of the District Court, sitting under Jud. Code, § 266, denying an application for a preliminary injunction upon the sole ground that the pecuniary amount requisite to confer jurisdiction was not involved, is reviewable by appeal here. P. 265.
2. In a suit by a railroad attacking as unconstitutional a state order requiring it to establish and operate an industrial spur track, the pecuniary amount involved includes, not only the cost of construction, but also interest thereon, depreciation, maintenance and operating expenses, capitalized at a reasonable rate. P. 267.

275 Fed. 128, reversed.

APPEAL from an order of the District Court refusing a preliminary injunction.

Mr. Fitzgerald Hall, with whom *Mr. Henry C. Peeples* and *Mr. Frank Slemons* were on the brief, for appellant.

No brief filed for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit commenced in the District Court by the Western & Atlantic Railroad, against the Railroad Commission of Georgia, its members, its special attorney, and the Attorney General of the State to restrain and enjoin the enforcement of an order of the Commission requiring the plaintiff to construct and put in service a spur or industrial track to the Farmers Warehouse Company's warehouse abutting the right of way of the railroad at Smyrna, Georgia. A law of Georgia (§ 2664 of the 1910 Georgia Code) authorizes the Commission to prescribe rules with reference to spur tracks and side tracks, and

with reference to their use and construction, and gives it power to compel service to be furnished warehouses and similar places of business along the line of railroads where practicable and in the judgment of the Commission the business is sufficient to justify, and on such terms and conditions as the Commission may prescribe. The plaintiff attacks the order as unreasonable and arbitrary because under the circumstances it would deprive the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment, interfere with and burden the interstate commerce of the plaintiff and compel it unjustly to discriminate against other shippers in violation of the Act to Regulate Commerce. Before the expiration of the time allowed by the Commission for compliance with its order, this suit was commenced and plaintiff gave notice of motion for temporary injunction. The defendants answered and, among other things, denied that the value of the matter in controversy is sufficient to give the court jurisdiction and averred that it does not exceed $3,000. There was a hearing before three judges as required by § 266 of the Judicial Code, and the application for a temporary injunction was denied upon the sole ground that the requisite amount was not involved. This appeal calls for a review of that ruling. *North Pacific S. S. Co.* v. *Soley*, 257 U. S. 216, 221; *Gilbert* v. *David*, 235 U. S. 561, 568.

The complaint alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and by way of detail it is stated, among other things, that the initial cost of the construction of the side track would be $1,266.24; that the interest on the money which plaintiff would have to expend for the construction of the track, depreciation charges, necessary maintenance and operating expenses would exceed $200 a year, and that compliance with the order would hamper and delay the plaintiff in the proper

operation of its trains and would impose upon it additional costs and expenses, but would not increase its earnings. The affidavit of the plaintiff's general manager supports the allegations of the complaint and states that the patrons of the plaintiff, including the Farmers Warehouse Company, have adequate trackage and depot facilities, not only to take care of present business but of any probable increase at Smyrna; that the railroad line from Atlanta to Chattanooga is largely single track; that the traffic is very heavy, and that the problem of keeping trains moving promptly is serious and difficult; that, because business does not justify it, the plaintiff does not have a switch engine at Smyrna, and, if the private siding were constructed in accordance with the order of the Railroad Commission, plaintiff would have to delay its freight trains so that the road engines could switch this additional track thereby delaying the prompt movement of the trains, and that the track could never be used by others and would be simply an accommodation for one patron, adding nothing to the earnings of the railroad but considerably increasing its expense. The affidavit of the plaintiff's superintendent also supports the complaint and is in substance to the same effect. Defendants' answer states that in all human probability the business of the warehouse will be permanent, and affidavits of directors of the warehouse company tend to support that statement. The denial of jurisdictional amount in defendants' answer is not supported by any affidavit in their behalf.

The decision in the District Court states:

"The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but $1,260, and this amount alone is involved. . . . The cost of future maintenance is not involved now, because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over

the track does not justify its maintenance, the question of its abandonment will be open then."

We are unable to agree that the cost in material and labor is all that is involved in this case. Plaintiff seeks to be relieved not only from constructing the side track but also from maintaining it in suitable condition for use, and from the cost and expense of using and operating it for the movement of cars to and from the warehouse. The value of all these is involved. *Glenwood Light & Water Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125; *Berryman* v. *Board of Trustees of Whitman College*, 222 U. S. 334; *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, 225; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336. It is shown that the permanent annual burden on account of interest on such cost, depreciation, maintenance and operating expenses of such side track will exceed $200, and this capitalized at a reasonable rate exceeds $3,000. Laying aside other considerations bearing upon the matter, the amount is shown to be sufficient. This being so, the District Court should have taken jurisdiction and should have proceeded to determine the merits of plaintiff's application for a temporary injunction, which it did not do.

Order declining jurisdiction vacated with directions for further proceedings.